

No. 96-1971-CFX Title: Mary Anna Rivet, et al., Petitioners
v.
Regions Bank of Louisiana, et al.

Docketed:
June 12, 1997 Court: United States Court of Appeals for
the Fifth Circuit

Entry	Date	Proceedings and Orders
Jun 11	1997	Petition for writ of certiorari filed. (Response due August 13, 1997)
Jul 2	1997	Order extending time to file response to petition until August 13, 1997.
Jul 2	1997	This extension of time is granted to all respondents.
Aug 13	1997	Brief of respondents Regions Bank of Louisiana, et al. in opposition filed.
Aug 27	1997	DISTRIBUTED. September 29, 1997
Sep 29	1997	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT January 21, 1998. *****
Oct 14	1997	Record filed.
Oct 23	1997	Record filed.
Nov 12	1997	Joint appendix filed.
Nov 12	1997	Brief of petitioners Mary Ann Rivet, et al. filed.
Dec 4	1997	CIRCULATED.
Dec 15	1997	Brief of respondents Regions Bank of Louisiana, et al. filed.
Jan 5	1998	Reply brief of petitioners Mary Ann Rivet, et al. filed.
Jan 21	1998	ARGUED.

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In The
Supreme Court of the United States
October Term, 1996

MARY ANNA RIVET, MINNA REE WINER, EDMOND
G. MIRANNE, and EDMOND G. MIRANNE, JR.,

Petitioners,
versus

REGIONS BANK, WALTER L. BROWN, JR.,
PERRY S. BROWN, and FOUNTAINBLEAU
STORAGE ASSOCIATES,

Respondents.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- (1) Does this Court's holding in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 396 n. 2, 101 S.Ct. 2424, 2427 n. 2, 69 L.Ed.2d 103 (1981), permit removal of a state court controversy involving mortgage rights in real property, solely on the basis that the defendants intended to assert the affirmative defense of claim preclusion based on a prior federal judgment, where the Petitioners had not filed the prior federal action and had no conceivable claim which might have been brought in federal court?
- (2) May a United States District Court reach a decision on the merits of a controversy prior to ascertaining whether federal jurisdiction over the controversy exists, and then use the decision on the merits to justify a decision to invoke jurisdiction over the controversy?

LIST OF PARTIES

The names of all Petitioners who are parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. With respect to the Respondents: Regions Bank of Louisiana is a wholly-owned subsidiary of Regions Financial Corporation. Fountainbleau Storage Associates is a Louisiana Limited Liability Company. Petitioners are unaware of the complete list of its principals. To the best of Petitioners' knowledge and belief, the following persons are among the principals of Fountainbleau Storage Associates:

1. Burnam Storage Associates
2. The Burnam Companies
3. CMC, A Division of Burnam Companies
4. Cris Burnam
5. Tim Burnam
6. Roland von Kurnatowski

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TO THE HONORABLE CHIEF JUSTICE AND THE
ASSOCIATE JUSTICES OF THE SUPREME COURT OF
THE UNITED STATES:

MAY IT PLEASE THE COURT,

Petitioners, Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne, and Edmond G. Miranne, Jr., respectfully pray that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on March 13, 1997.

OPINIONS AND JUDGMENTS BELOW

The Opinion and Judgment of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered March 13, 1997, is reported at 108 F.3d 576 (5th Cir. 1997) and is reprinted in the Appendix to this Petition at pages App. 1 through App. 43. The Order and Reasons of the United States District Court for the Eastern District of Louisiana, entered April 20, 1995, are reprinted in the Appendix to this Petition at pages App. 44 through App. 53.

STATEMENT OF JURISDICTION

The judgment of the oral argument at the United States Court of Appeals for the Fifth Circuit was entered on March 13, 1997, affirming the Order and Reasons of the United States District Court for the Eastern District of Louisiana, dated April 20, 1995. A Suggestion of *En Banc* Treatment was denied on April 15, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the following provisions of the United States Code:

Title 28 U.S.C. § 1441:

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction in the Court of First Instance.

This action was originally filed in the Civil District Court for the Parish of Orleans, State of Louisiana, to seek recognition of a mortgage on real property located in Orleans Parish, and damages for certain property transfers within Orleans Parish that abrogated Petitioners' rights under that mortgage. It was removed to the United States District Court for the Eastern District of Louisiana, pursuant to 28 U.S.C. § 1441(b), on the basis of federal question jurisdiction. All parties are citizens and residents of the State of Louisiana. The essence of this Petition is that there was no basis for federal question jurisdiction or for removal jurisdiction in the District Court.

In her dissent from the Opinion of the Court of Appeals, Judge Edith H. Jones correctly analyzed the provenance of this action as follows:

This is a state law claim. The only federal element that plaintiffs could have pleaded is an anticipatory defense . . .

App. 39.

Thus, this claim could not have been brought originally in federal court. Both the District Court and the Fifth Circuit constructed a fatally flawed rationale for removal jurisdiction based upon *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 396 n. 2, 101 S.Ct. 2424, 2427 n. 2, 69 L.Ed.2d 103 (1981) (hereinafter referred to as "Moitie"). Utilizing this rationale, both lower courts constructed a completely self-referential tautology in which they first made a decision on the merits, i.e., that Petitioners' claims were barred by the preclusive effects of a prior federal judgment, and then based removal jurisdiction in the first instance on that decision on the merits.¹ The District Court could not have exercised jurisdiction over this action in the first instance, and there was thus no basis for removal jurisdiction.

II. Statement of the Facts.

In a complex series of transactions which were all finalized on December 29, 1993, Respondent Regions Bank of Louisiana ("Regions Bank"), which owned certain property rights with respect to a parcel of real property located in Orleans Parish, purchased those rights which it did not own from Respondents Walter L. and Perry S. Brown ("the Browns"), and then sold the entire

¹ Petitioners maintained below, and continue to maintain in this Court, that their claims are not subject to the preclusive effects of the prior judgment.

fee interest to Respondent Fountainbleau Storage Associates ("FSA").² App. 5-6. At the time of the sale, there was a currently valid \$5 million collateral mortgage duly recorded and re-inscribed in the name of Petitioners by the Recorder of Mortgages of Orleans Parish. The mortgage encumbered both the underlying leasehold estate and the buildings and other improvements. App. 3-4.

There was no provision made in the sale for the recognition of Petitioners' mortgage, and the various closing documents made no mention of it whatsoever. Louisiana is a "Record Notice" jurisdiction. *McDuffie v. Walker*, 51 So. 100 (La. 1909). On December 29, 1994, Petitioners brought suit in the Civil District Court for the Parish of Orleans seeking recognition of their mortgage and damages for the transfers by Regions Bank in derogation thereof. App. 6.

Regions Bank had first come into possession of its rights in the subject property through a bankruptcy proceeding that was terminated in October of 1986. App. 4-6. Prior to that time, the subject property had numerous liens and encumbrances against it, including a \$15 million first mortgage in the name of Regions Bank and Petitioners' mortgage, which was at that time a second or junior encumbrance. *Id.* During July and August of 1986, the bankruptcy trustee sought and was granted approval by the Bankruptcy Court for the Eastern District of Louisiana to sell the subject property. App. 4-5. At the ensuing auction sale, Regions Bank used its first mortgage to "credit bid" and bought the buildings and improvements and the leasehold estate. The underlying land was not

² Regions Bank is the successor corporate entity to both First Financial Bank, FSB, and SECOR Bank. In the interest of clarity, Regions Bank and all its various corporate predecessors will be referred to by that single name.

subject to the bankruptcy sale and was owned by the Browns until Regions Bank bought it from them in December, 1993. App. 5-6.

The order authorizing the sale by the trustee purported to authorize that the property be sold "free and clear of all liens and encumbrances". It is undisputed, however, that no adversary proceeding was held pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedure, as is mandated by the Bankruptcy Code before a lien such as Petitioners' mortgage may be cancelled. App. 21-23. The only proceeding which was held with respect to this order was a motion hearing of a type which has consistently been held to be insufficient to cancel a lien or other encumbrance. Thus, as a matter of law, Regions Bank bought the property "subject to" Petitioners' mortgage. *In re Parrish*, 171 B.R. 138, 141 (Bkrtcy.M.D.Fla. 1994); *In re Wing*, 63 B.R. 83, 85 (Bkrtcy.M.D.Fla. 1986).

Regions Bank maintained below that Petitioners were barred by *res judicata* from challenging the ultimate District Court judgment that terminated the bankruptcy proceeding in October, 1986. App. 7. Regions also maintained that the motion hearing in the Bankruptcy Court and the resulting order were effective to extinguish Petitioners' mortgage, despite the lack of authorization for such a procedure in the Bankruptcy Code. App. *Id.*

Despite this claim, however, over the course of almost eleven years, Regions Bank has failed to procure the cancellation of Petitioners' mortgage on the mortgage rolls of Orleans Parish, and has proffered no explanation for this failure. App. 5. Neither did Regions Bank seek to renew the bankruptcy judgment which lapsed in 1996. Regions Bank's own first mortgage was never re-inscribed, expired under the applicable statute of limitations in September of 1993, and was duly removed from

the mortgage rolls by the Recorder of Mortgages. App. 5-6. In fact, Regions Bank's mortgage was actually extinguished by operation of law in 1986, pursuant to the Louisiana doctrine of confusion, when Regions became the holder of both the mortgage and the subject property. Thus, at the time this action was commenced, Petitioners' mortgage was the only encumbrance duly recorded against the subject property. App. 5-6 & n. 7.

Both the District Court and the Fifth Circuit sustained Regions Bank's claim of preclusion based upon the bankruptcy order and resulting District Court judgment. App. 44-53. Petitioners maintained that preclusion did not apply for two reasons: First, the cause of action sued upon was not the same as that giving rise to the bankruptcy proceeding. The essential facts establishing the cause of action sued upon were the recorded existence of the mortgage – which had been affirmatively reinscribed by the Recorder of Mortgages at the request of Petitioners in 1994³ – and the sale in derogation of the mortgage in 1993, all of which occurred after the entry of the bankruptcy judgment, and none of which was involved in the bankruptcy proceeding. App. 6-7.

Second, Petitioners were not parties to the bankruptcy action. Two Petitioners (the Mirannes) appeared in the bankruptcy proceeding as creditors of the bankrupt estate, but were never named as parties thereto, and it is undisputed that no adversary proceeding was held in which they could have formally contested the cancellation of their mortgage as required by the bankruptcy rules. App. 4-5. Even if this were enough to make those two Petitioners parties to that action for purposes of

³ The mortgage note, which the mortgage secured, was duly reinstated by the maker, and prescription thus waived, in favor of Petitioners in 1989 and 1994.

preclusion, the Bankruptcy Court had no power under the Bankruptcy Code to cancel the mortgage without an adversary proceeding, and thus, the cancellation of the mortgage was not properly a part of the resulting judgment. The other two Petitioners (Rivet and Winer) were and remain the spouses of the Mirannes, but they did not appear in the bankruptcy proceeding in any capacity and were not represented by counsel. App. 19-20.

III. Course of proceedings and disposition in the Court below.

Suit was commenced on December 29, 1994, in the Civil District Court for the Parish of Orleans. The Removal Petition was filed on February 3, 1995, by Counsel for Respondent FSA. On or about February 27, 1995, Respondent Regions Bank made a Motion for Summary Judgment. On or about March 3, 1995, the Browns made a similar Motion for Summary Judgment, and on March 21, 1995, FSA filed its Motion for Summary Judgment. All three Motions were submitted without oral argument on April 5, 1995.

On March 6, 1995, Petitioners made a Motion to Remand which was also submitted without oral argument on April 5, 1995. On April 21, 1995, the District Court denied Petitioners' Motion to Remand and granted Respondents' Motions for Summary Judgment. The District Court's Order and Reasons (hereinafter "the District Court Opinion"), was signed by the Court on April 20, 1995 and entered by the Clerk of Court on April 21, 1995. App. 44-53. The Judgment ordering dismissal of the entire action was signed on April 25, 1995, and entered by the Clerk of Court on April 27, 1995. On May 19, Petitioners filed a timely Notice of Appeal from both the Order and Reasons and the Judgment ordering dismissal.

Briefing in the Court of Appeals was complete on October 19, 1995, and oral argument was had on October 2, 1996. The Court of Appeals affirmed the District Court in a two-to-one panel decision dated March 13, 1997. App. 1-36. Judge Edith H. Jones filed a dissenting opinion. App. 36-43. Petitioners' subsequent Suggestion of *En Banc* Treatment was denied without opinion on April 15, 1997. This Petition for a Writ of Certiorari was timely filed in this Court on June 11, 1997.

Both the District Court and the appellate panel made a determination on the merits before they had determined the existence of either removal jurisdiction or federal subject matter jurisdiction. Both lower courts then used this determination on the merits as the sole basis for federal jurisdiction. Because there was no federal jurisdiction over this exclusively state-law cause of action, both lower courts lacked the basic power to hold that Petitioners' claims were barred by the preclusive effects of the prior order of the Bankruptcy Court.

This basic lack of jurisdiction is the sole issue that Petitioners seek to place before this Court. Because of the circular reasoning of both lower courts, however, certain peripheral issues appear at first blush to assume greater importance than is in fact the case.

Perhaps most obvious is the issue of the existence of the mortgage. In the first instance, it is indisputably a matter of state law whether or not a mortgage exists on real property located in that state. And, by the clear mandate of this Court, it is also for the state court to ascertain and apply the preclusive effects of prior federal judgments. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S.Ct. 1684, 1691, 100 L.Ed.2d 127 (1988); *Clothing Workers v. Richman Brothers Co.*, 348 U.S. 511, 518, 75 S.Ct. 452, 456-457, 99 L.Ed.2d 600 (1955). On the instant facts, however, it is undisputed that Respondents did not in

fact procure the cancellation of Petitioners' mortgage, whether or not the bankruptcy judgment gave them the right so to do, and that the judgment has now lapsed. Because of the basic lack of removal jurisdiction, however, this issue should not have been before the lower courts, and is not properly before this Court.

The jurisdictional formulation of the lower courts is simply that if a case filed in state court is "completely precluded" by a prior federal judgment, then for that reason alone, the District Court has removal jurisdiction, no matter what the nature of the cause of action is. As Judge Jones put it in her dissent:

The majority essentially holds that a conceivable federal claim is not necessary for removal, as long as there is a federal defense of *res judicata* based on a federal judgment.

App. 41 (Emphasis in original).

Put succinctly, the validity of this formulation is the basic issue raised by this Petition, and its reversal would be completely determinative of jurisdiction. Among other things, Petitioners maintain that even if the preclusion decision were "correct", this would still not have conferred removal jurisdiction. Preclusion or *res judicata* is indisputably an affirmative defense, and thus cannot be a part of Petitioners' claim. Fed.R.Civ.P. 8(c). Moreover, a holding that a claim is precluded is also indisputably a determination on the merits which the District Court must make after, and not before, it has accepted jurisdiction. *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939, 946 (1946). See also *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 912, 917 (1951).

Thus, the lower courts' holdings that Petitioners' claims were "completely precluded" were also not properly before those courts, and are not properly before this

Court, because of the lack of removal jurisdiction. Nevertheless, Petitioners maintain that the substance of the determination that their claims were precluded was also in error. Thus, even if the lower courts' tautological jurisdictional formulation was proper, there was still no jurisdiction because there was no preclusion. However, because Petitioners maintain that this determination has not properly been placed before a federal court for decision, and in the interest of brevity, this point will be addressed only briefly in this Petition.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. Summary of Argument.

There was no basis for either removal jurisdiction or federal subject matter jurisdiction over this action in the District Court. Thus, the decisions of both lower courts lack any jurisdictional basis and must not be allowed to stand. A correct result could be reached in this case with a summary reversal and an order of remand to the state court. There are several reasons, however, why this Court should address the jurisdictional issues presented by this Petition.

The sole precedential basis for both decisions below was footnote 2 of this Court's *Moitie* opinion. Both the *Rivet* opinion by the Fifth Circuit, and indeed the *Moitie* footnote itself, stand in direct contradiction to every other jurisdictional precedent of this Court for at least the last sixteen years. Moreover, because this Court has reaffirmed the basic principles of removal jurisdiction in at least three major opinions subsequent to *Moitie*, and in such a way as to negate the implications of footnote 2, Petitioners respectfully submit that *Moitie*, at least with respect to footnote 2, has been overruled *sub silentio*, and thus should not be allowed to continue to confuse the

otherwise clear principles of removal jurisdiction articulated by this Court.

In addition, the particular jurisdictional formulation that the Fifth Circuit has constructed, based ostensibly on *Moitie*, violates the most basic rules of jurisdiction, and as such is directly contrary to other controlling precedent of this Court. The *Rivet* formulation permits removal jurisdiction in an instance in which the action could not have been brought originally in federal court because there was no conceivable federal claim presented by the facts. The *Rivet* formulation permits removal jurisdiction to be based on an affirmative defense. The *Rivet* formulation violates this Court's rule that state courts are presumed competent to interpret and apply federal law, including most pointedly the preclusive effects of federal judgments.

In addition, the *Rivet* formulation requires the District Court to reach a determination on the merits at the outset, and then use that determination on the merits as a basis for jurisdiction. This violates what is arguably the most basic rule of jurisdiction: that a court may not take any action to affect the merits of a case until it has first found that it has jurisdiction.

The *Rivet* formulation allows a District Court to order that a case be removed from a state court where that case has no essential federal character whatsoever. Specifically, the direct implication of the *Rivet* formulation is that a suit between citizens of the forum state, to enforce a mortgage on real property located in the forum state, is essentially federal in character merely because the defendant has an arguably effective affirmative defense based upon a prior federal bankruptcy order, even where the judgment resulting from the order has lapsed and was never actually used to cancel the mortgage in question.

This is a gross imposition of naked federal authority on the sovereignty of state courts.

The *Rivet* formulation in reality has no precedential basis whatsoever. There is not one single reported opinion that actually supports the *Rivet* formulation. The *Rivet* opinion purports to rest its formulation on *Moitie* and on a previous interpretation of *Moitie* by the Fifth Circuit. As the *Rivet* dissent points out, however, the facts at bar do not fit under the facts at bar in *Moitie*, and the previous Fifth Circuit opinion took great pains to limit its interpretation of *Moitie* strictly to the facts of that case. App. 40-42. Moreover, the Ninth Circuit, whence *Moitie* arose and the only circuit to have addressed *Moitie* in any meaningful way, would also limit *Moitie* to its facts, and thus impose a specific limitation on the *Moitie* footnote which would not cover the situation at bar. App. 37-38 & n. 3. Thus, not only is *Rivet* *sui generis*, but Petitioners would respectfully submit that it also removes virtually any limitation to the naked assertion of federal power over a state court, where the defendant merely intends to assert an affirmative defense based on federal law.

Finally, even if the specific *Rivet* formulation were to be countenanced, the irony is that there still should not be removal jurisdiction, even under the formulation, because the requirements of claim preclusion are not met, and thus Petitioners' claims were not "completely precluded". The cause of action sued upon was demonstrably not the same as that in the earlier federal bankruptcy proceeding, and this is obvious as a matter of law. In addition, two of the Petitioners should not be held to have been parties to the bankruptcy proceeding even though they appeared as creditors of the bankrupt estate. And, in order to hold that the other two petitioners were parties to the bankruptcy proceeding – even though they did not appear in that proceeding in any form – the Fifth

Circuit relies exclusively upon the determination of a fact not in the record of this case, *i.e.*, that there was no separate property agreement between the respective sets of spouses. App. 19-20 & nn. 48, 49.⁴

For all these reasons, this Court should allow this Petition and issue a Writ of Certiorari. The *Rivet* formulation should not be allowed to stand in direct and flagrant contradiction to the clear precedent of this Court. The necessity for this Court to address the issues in *Rivet* is expressed most pointedly in Judge Jones' dissent:

Any reader who has followed the majority opinion and this dissent thus far ought to appreciate that our dispute, while technical, is not trivial. The principles of limited federal court jurisdiction and the relative clarity of jurisdictional rules are at issue. *Moitie* and *Carpenter* can be read to authorize removal of this state-law-based case simply because it is subject to a federal preclusion defense. But to do so, as I have shown, intrudes on the scope of the well-pleaded complaint rule, expanding removal jurisdiction while engendering complexity and uncertainty in the future. I do not believe such results were intended by the Supreme Court in *Moitie* or by the *Carpenter* panel . . .

App. 42-43 (Emphasis added and footnote omitted).

⁴ The issue of community property/separate property was not raised in or by the District Court, and was not a part of the briefing in the Court of Appeals. Thus, Petitioners *Rivet* and *Winer* were never afforded the opportunity to demonstrate that they had in fact entered into separate property agreements with their spouses. In addition the opinion's unsupported and puzzling statement that Petitioners' "subsequent state court complaint listed only the husbands as owners of the collateral mortgage note . . ." (App. 20) is unattributed in the opinion and has no support whatsoever in the record.

II. The opinion below is directly contrary to controlling precedent of this Court.

In *Rivet*, the Fifth Circuit affirmed the District Court's reasoning that an essentially state-law cause of action may be removed to federal court if the defendant in state court intends to assert the affirmative defense of claim preclusion or *res judicata*, and the federal court finds, in a decision on the merits, that the defense would be effective. Relying on *Carpenter v. Wichita Falls Independent School District*, 44 F.3d 362 (5th Cir. 1995) (hereinafter "Carpenter"), the *Rivet* panel reasoned as follows:

In thus clearly setting forth the rule for this circuit, the *Carpenter* panel concluded by stating that:

"[w]e hold that *Moitie* should apply only where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law."

. . . we conclude that the district court properly reasoned that *Carpenter*'s holding provides the sole framework for analyzing the jurisdictional issues raised [herein] . . . and just as the district court here found, *Carpenter* controls. Accordingly, if the defendants can show that [Appellant]'s state court suit . . . is in fact barred by the claim preclusive effects of the [prior federal judgment], then the district court's denial of the . . . motion to remand, and its dismissal of the suit for essentially the same reason, must be affirmed.

App. 17-18. (Emphasis by the Court and Footnote omitted).

In addition, though it does not appear to bear on the actual holding, as set forth above, the *Rivet* opinion also

discusses the "artful pleading" exception to the well-pleaded complaint rule. Again relying on *Carpenter*, the opinion states as follows:

The common rationale for these jurisprudential exceptions – euphemistically known by the cynically sarcastic sobriquet of the "artful pleading exception" – is that when the plaintiff has available "no legitimate or viable state cause of action", but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising exclusively under state law."

App. 9-10 (Emphasis added and Footnotes omitted).

According to the *Rivet* Panel, *Carpenter*'s and *Moitie*'s notion that removal jurisdiction is conferred by a state-court defendant's assertion of an apparently-effective affirmative defense of claim preclusion, is but a "rarer specie [sic] of artful pleading". App. 11. By this rationale, the Panel has in essence held that a state-court suit to enforce a mortgage *via ordinaria*, on land located in, and between residents of, the forum state, and with no other connection to federal law than the presumed affirmative defense, is "essentially federal" in character. App. 37-38, 39.

At the outset, there are at least three points which are absolutely clear under this Court's precedent, and with respect to which the *Rivet* holding is in direct violation of that precedent. First, this is not a case of "artful pleading". As Judge Jones points out in her dissent:

. . . what we also do not have in this case, but [which] was essential in *Moitie* and obviously present in *Carpenter*: a conceivable federal claim that could be asserted by the plaintiff. . . . To say that a plaintiff's claim can be removed to federal court when he has alleged no conceivable federal claim is true mockery of the well-pleaded complaint rule and the artful pleading doctrine. How can the

artful pleading doctrine apply if the plaintiff's claims cannot be recharacterized into an essentially federal claim that has been omitted by artful pleading?

App. 41 (Emphasis added and citation omitted).

As this Court has made plain, the artful pleading doctrine does not convert legitimate state claims into federal ones, but rather reveals the suit's "necessary federal character". See *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 23, 103 S.Ct. 2841, 2854, 77 L.Ed.2d 420 (1983) (hereinafter referred to as "*Franchise Tax Board*"). To say that a state-court suit to enforce a mortgage is "either wholly federal or nothing at all" or that such a plaintiff "necessarily is stating a federal cause of action whether he chooses to articulate it that way or not" is a direct violation of *Franchise Tax Board*. See *Carpenter v. Wichita Falls Independent School District*, 44 F.3d 362, 366 (5th Cir. 1995), quoting, 14A Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3722 (2d ed. 1985).

Perhaps the most basic and fundamental principle of the law of removal jurisdiction is that an action filed in state court may not be removed to federal court unless that action could have been brought originally in federal court. *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 840-841, 109 S.Ct. 1519, 1521, 103 L.Ed.2d 924 (1989) (hereinafter referred to as "*Oklahoma Tax Commission*"). Because this state-law mortgage action could not conceivably have been brought originally in federal court, there can be no removal jurisdiction. Perhaps the most pointed comment from the recent jurisprudence to this effect is found in *Rains v. Criterion Systems, Inc.*, 80 F.3d 339 (9th Cir. 1996):

The claim was authorized by state law and no essential federal law was omitted. The artful pleading doctrine does not permit defendants to

achieve what they are trying to accomplish here: to rewrite a plaintiff's properly pleaded claim in order to remove it to federal court.

80 F.3d at 344.

Second, Fed.R.Civ.P. 8(c) expressly declares claim preclusion or *res judicata* (as well as discharge in bankruptcy) to be an affirmative defense. See *American Casualty Co. v. United Southern Bank*, 950 F.2d 250, 253 (5th Cir. 1992). The *Rivet* opinion does not cite a single precedent or present a single argument as to why Rule 8(c)'s clear command should be ignored in this case. This Court's precedent is both clear and well-settled: Removal jurisdiction is not conferred where the federal right is to be raised as a defense to a cause of action under state law. *Oklahoma Tax Commission*, 489 U.S. at 840-841, 109 S.Ct. at 1521. This is so even where the determination of the federal right or immunity either is or may be dispositive of the case. *Franchise Tax Board*, 463 U.S. at 13, 103 S.Ct. at 2848; *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 396-398, 107 S.Ct. 2425, 2431-2433, 96 L.Ed.2d 318 (1987) (hereinafter referred to as "*Caterpillar, Inc.*"); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). See also *Arkansas v. Kansas & Texas Coal Co.*, 183 U.S. 185, 188, 22 S.Ct. 47, 48, 46 L.Ed. 144 (1901) ("jurisdiction is not conferred by allegations that defendant intends to assert a defense based on . . . a law . . . of the United States.") (Emphasis added).

Third, the *Rivet* opinion's unarticulated rationale for its decision appears to be to prevent Petitioners from engaging in a "collateral attack" on the earlier federal judgment. See, e.g., App. 17-18, 31-32. Quite obviously, Petitioners do not view their cause of action in this light. Nevertheless, even if this were a completely fair characterization of this case, that would still not confer removal jurisdiction. Once again, this Court has made it clear that:

. . . when a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court. . . . [Appellees] must present their [claim preclusion] argument to the [Louisiana] state courts, which are presumed competent to resolve federal issues.

Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 108 S.Ct. 1684, 1691, 100 L.Ed.2d 127 (1988); *Clothing Workers v. Richman Brothers Co.*, 348 U.S. 511, 518, 75 S.Ct. 452, 456-457, 99 L.Ed.2d 600 (1955).

In short, Respondents' proper course of action was to have presented their affirmative defense based upon claim preclusion to the Louisiana State Court. Based upon the violation of precedent discussed in this section alone, the *Rivet* opinion should not be allowed to stand as it is, in such direct and flagrant contradiction to the clear precedent of this Court.

III. The opinion below makes a determination on the merits before it has accepted jurisdiction.

Perhaps the most crucial way in which the *Rivet* opinion is flawed is that the opinion, as well as the *Carpenter dicta*, does fundamental violence to the most basic analytical framework of all federal subject matter jurisdiction, including removal jurisdiction. The most basic principle of subject matter jurisdiction is that the determination of the existence of jurisdiction must be made first, and if jurisdiction does not exist – as it does not in this case – no further action may be taken that will affect the merits of the claim. See *Holy Cross College v. Louisiana High School Athletic Ass'n*, 632 F.2d 1287, 1289 (5th Cir. 1980), quoting *Spector v. L. Q. Motor Inns, Inc.*, 517 F.2d 278, 281 (5th Cir. 1975) (A district Court's " . . . jurisdictional inquiry is 'limited to observing whether the

complaint is drawn to seek recovery under a federal statute . . . '").

Moreover, it is well-settled that:

Summary Judgment is a judgment on the merits; it has the same effect as if the case had been tried by the party against whom judgment is rendered and decided against him.

Daigle v. Opelousas Health Care, Inc., 774 F.2d 1344, 1348 (5th Cir. 1985) (Rubin, J.) (Emphasis added). And, as this Court has held unequivocally:

Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction.

Bell v. Hood, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939, 946 (1946). This case dealt with a motion to dismiss for failure to state a claim, and thus its admonition that a decision on the merits may be made only "after and not before" jurisdiction has been accepted is even stronger with respect to a motion for summary judgment. See also *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 912, 917 (1951).

The *Rivet* opinion, however, sets up an analytical framework where a decision on the merits (complete preclusion) is made first, and then that decision on the merits is used as the sole basis for the Court's jurisdiction to reach a decision on the merits. This analytical framework is a completely self-referential tautology. In other words, the Court has no jurisdiction to decide the merits until it decides the merits which decision gives it jurisdiction to decide the merits in the first place. Within the framework of jurisdictional analysis, this is a virtually open-ended expansion of federal jurisdiction.

This analytical flaw is clear from even a cursory reading of the *Rivet* opinion. The first half of the opinion (App. 1-18) determines that removal jurisdiction will exist if a state-court action is "completely precluded". But, it is not until the second half of the opinion (App. 18-36), when the Court is considering the merits of the case pursuant to a motion for summary judgment, that the opinion concludes that the Court does indeed possess jurisdiction because the case is "completely precluded".

The foregoing analysis leads to only two possible conclusions: (1) *Carpenter's* and the *Rivet* Panel's interpretations of the *Moitie* footnote are incorrect; and/or (2) The *Moitie* footnote has been overruled, *sub silentio*, by *Franchise Tax Board*, *Oklahoma Tax Commission*, and/or *Caterpillar, Inc.* Petitioners respectfully suggest that the second analytical alternative is the more correct reading of this Court's precedent.

IV. An expansive reading of the *Moitie* footnote has been implicitly disavowed by this Court.

The *Rivet* Panel found that this case was controlled by the Fifth Circuit's earlier decision in *Carpenter*. The point at issue in *Carpenter* was the interpretation of the famous "enigmatic footnote" in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 396 n. 2, 101 S.Ct. 2424, 2427 n. 2, 69 L.Ed.2d 103 (1981). *Carpenter*, 44 F.3d at 368-369, 370-371. If the *Rivet* Panel's interpretation of *Carpenter's* interpretation of the *Moitie* footnote is the correct one, then that aspect of *Moitie* has been overruled *sub silentio* by this Court's controlling precedent, and both *Carpenter* and *Rivet* are in violation of that precedent in several particulars, as discussed in the preceding sections.

Moitie was decided in 1981. Less than two years later, in 1983, in *Franchise Tax Board*, the Supreme Court *unanimously* reaffirmed every major principle of removal jurisdiction under 28 U.S.C. § 1441(b) without mentioning, citing, or in any way clarifying the controversial footnote. Moreover, Justice Brennan, the author of *Franchise Tax Board*, had expressly dissented from the *Moitie* footnote, and the author of *Moitie*, Justice Rehnquist, joined the later opinion. As demonstrated above, *Carpenter's* and *Rivet's* interpretations of the *Moitie* footnote are simply not consistent with the unambiguous principles laid down in *Franchise Tax Board*. Subsequently, in *Caterpillar, Inc.* (1987) and *Oklahoma Tax Commission* (1989), both of which were also unanimous decisions, Justice Brennan and a *per curiam* Court gave ringing affirmation of certain specific aspects of removal jurisdiction that are in no way consistent with *Moitie*, *Carpenter*, or the *Rivet* decision.

Most particularly, in *Oklahoma Tax Commission*, this Court held that:

... it has long been settled that the existence of a federal [defense] to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense arises under federal law.

489 U.S. at 841, 109 S.Ct. at 1521, *citing*, *Gully v. First National Bank*, 299 U.S. 109, 109 S.Ct. 96, 81 L.Ed. 70 (1936). This is so even where the determination of the federal right or immunity either is or may be dispositive of the case. *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 13, 103 S.Ct. 2841, 2848, 77 L.Ed.2d 420 (1983); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 396-398, 107 S.Ct. 2425, 2431-2433, 96 L.Ed.2d 318 (1987); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). See also *Arkansas v. Kansas & Texas Coal Co.*, 183

U.S. 185, 188, 22 S.Ct. 47, 48, 46 L.Ed. 144 (1901) ("jurisdiction is not conferred by allegations that defendant intends to assert a defense based on . . . a law . . . of the United States.")

Similarly, in *Caterpillar, Inc.*, this Court unanimously suggested that the artful pleading doctrine should be strictly limited to cases involving complete preemption of the state cause of action. 482 U.S. at 392, 396 & n. 11, 107 S.Ct. at 2430, 2432 & n. 11. And in 1986, this Court specifically declined, subsequent to *Moitie*, to recognize federal question jurisdiction merely because a state cause of action required the interpretation of a federal statute. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 810, 106 S.Ct. 3229, 92 L.Ed. 650 (1986) (where state cause of action relied on an interpretation of the Federal Food, Drug, and Cosmetic Act, but where there was no federal cause of action for FDCA violations, federal-question jurisdiction was not invoked).

These post-*Moitie* precedents have led at least three scholarly commentators to conclude either that the *Moitie* footnote has been overruled, or that it should be treated merely as an aberration. See Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 Hastings L.J. 273, 303-315 (January, 1993) and Stanley Blumenthal, Jr., *Artful Pleading and Removal Jurisdiction*, 35 UCLA L.Rev. 315, 365 (1987) (arguing that *Moitie*'s ruling on the removal issue should be disregarded). Moreover, as the Ragazzo article points out, allowing removal jurisdiction to turn upon claim preclusion affords the defendant two bites at the apple. If the federal court concludes that claim preclusion does not apply, then the same defendant may re-allege that defense in the state court. The federal determination will have no preclusive effect because the federal court will have used it to conclude ultimately that it did not

have subject matter jurisdiction. *Ragazzo*, *op. cit.* at 311; *see also* Judge Jones dissent, App. 42 n. 7.

Similarly, Rona L. Pietrzak, *Comment, Federated Department Stores v. Moitie: A Radical Departure From Traditional Removal Jurisdiction or an Aberration?*, 43 Univ.Pitt.L.Rev. 1165, 1178 (1982), concludes that this Court did not actually intend to alter the law of removal jurisdiction because the controversial footnote was "striking in its cautiousness". If Professor Pietrzak was correct, that fact has certainly not been perceived by lower federal judges. *Rivet* is not only the latest, but also the most extreme example of the extent to which lower federal courts have felt empowered to expand removal jurisdiction by the *Moitie* footnote.

In this light, Petitioners respectfully submit that the time is ripe, after sixteen years of confusion, for this Court to re-address the *Moitie* footnote and either overrule it directly or at least clarify it so as to clarify the law of removal jurisdiction. The current situation has led to a veritable quandary in the district courts when trying to apply *Moitie* in the removal context. This quandary may perhaps best be seen in two particular district court cases. In *Magic Chef, Inc. v. International Molders Union*, 581 F.Supp. 772, 776 n. 4 (E.D.Tenn. 1983), the Eastern District of Tennessee found that *Moitie*'s value as authority regarding removal jurisdiction was "supersede[d]" by this Court's opinion in *Franchise Tax Board*, which, as noted, was written by Justice Brennan, a vocal dissenter in *Moitie*, and which does not cite *Moitie* at all. In *Gold v. Blinder Robinson & Co.*, 580 F.Supp. 50, 53 (S.D.N.Y. 1984), the Southern District of New York found that:

Although it is perhaps impossible intellectually to reconcile *Moitie* with established law, it seems proper, absent more direct and fuller consideration of the issue by the court, to view the result as an aberration. . . . "

Finally, the proposition that the *Moitie* footnote needs to be re-addressed and clarified can be seen even more clearly from the range of expansive opinions from the several Circuit Courts of Appeal. This will be discussed in the next and concluding section.

V. The opinion below has no precedential basis in any other reported opinion.

Through an analysis of Circuit Court attempts to grapple with the *Moitie* footnote over the past sixteen years, one may discern the analytical quandary into which this footnote has thrown the jurisprudence of removal jurisdiction, with particular respect to the well-pleaded complaint rule and the artful-pleading doctrine. With *Rivet's* formulation, and the resulting rule of decision – that a state court mortgage action may be removed even where there is no conceivable federal claim that could have been articulated by the state court plaintiffs – Petitioners respectfully submit that the law of removal jurisdiction has reached an analytical nadir, the bottom of the proverbial “slippery slope”. At an absolute minimum, as Judge Jones points out in her dissent, “the majority has cited no case”, and Petitioners have found no case, “where *Moitie* removal has been allowed where the [state court] plaintiff had not [himself] brought a prior suit grounded in federal law”. App. 37 n. 3.

As noted, *supra*, the *Rivet* majority felt that it was bound by the Fifth Circuit’s prior ruling in the *Carpenter* case. App. 17-18. Petitioners argued below that much, if not most, of *Carpenter’s* discussion of *Moitie* was *dicta* since that case actually found that removal jurisdiction did not exist and remanded Mrs. Carpenter’s action to the Texas State Court. App. 17-18; 44 F.3d at 370-371. Judge Jones agreed with this analysis of *Carpenter*. App. at 36-37. At an absolute minimum, however, it cannot be

denied that the preordinating basis of the *Carpenter* opinion’s treatment of *Moitie* was to limit the application of footnote 2 to the facts of *Moitie*. The Court said:

Moitie is a *res judicata* case, not a removal case. The decision centered on the Ninth Circuit’s creation of a novel exception to the rule of *res judicata*, an issue the [Supreme] Court was evidently eager to reach. Furthermore, the marginal treatment of the removal issue makes us hesitate to expand *Moitie* beyond its facts, for a broad interpretation would counter principles established long before, and reaffirmed after, footnote 2 was written.

44 F.3d at 369 (Footnote omitted).

Again at a minimum, it cannot be denied that the facts at bar do not square with the facts of *Moitie*. Here, Petitioners did not file the prior federal action relied upon for its preclusive effects (App. 4-5, 7), and they have no “conceivable federal claim” based upon the cause of action as alleged. App. 41. In *Moitie*, plaintiffs had filed and lost the prior antitrust claim in federal court, and had simply refiled the same factual allegations under a state antitrust statute. 452 U.S. at 395-397, 101 S.Ct. at 2426-2427. Again, as Judge Jones put it:

In every respect, [the *Rivet*] characteristics represent a more complex procedural scenario than did the *Moitie* plaintiff’s copycat pleadings in federal and then state court.

App. at 39.

Indeed, the very fact that the *Rivet* majority can purport to feel bound by the holdings in *Carpenter* and *Moitie* and then proceed to fashion a holding so far beyond the facts of either case, is almost perfectly illustrative of the analytical quandary in which the Circuit Courts of Appeals have found themselves in attempting to apply

the *Moitie* footnote to the otherwise crystal clear jurisprudence of removal jurisdiction. This analytical quandary is also very well illustrated by the colloquy between the *Rivet* majority (App. 30-32) and Judge Jones in dissent (App. 37-38 & nn. 3, 4, & 5) with respect to the proper analysis of *Moitie* as well as prior precedent from other circuits.

What follows is an analysis of selected Circuit Court cases applying the *Moitie* footnote. When reviewing this analysis, there are three points that should be borne in mind: (1) Not a single case has allowed *Moitie* removal where, as here, the state court plaintiff did not himself file the prior federal action which was relied upon for its preclusive effects. (2) The analytical formulation of every one of these cases – at least where removal was allowed – is in violation of this Court's precedents with respect to removal jurisdiction in either *Franchise Tax Board, Oklahoma Tax Commission, and/or Caterpillar, Inc.* (3) Every one of these cases is also in violation of this Court's command in *Chick Kam Choo* that state courts are "presumed competent" to ascertain and apply the preclusive effects of a prior federal judgment. 108 S.Ct. at 1691. If nothing else, the utterly basic need for respect for this Court's precedents requires that the *Moitie* footnote be readdressed at this time and either overruled explicitly or clarified.

Perhaps the most interesting wrinkle in *Moitie* analysis begins with two early Ninth Circuit cases, the Circuit whence *Moitie* itself arose. First, in the year after *Moitie* was decided by this Court, the Ninth Circuit had its first occasion to apply footnote 2 in the context of removal jurisdiction. In *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1427 (9th Cir. 1984), the Court was confronted with facts virtually identical to *Moitie* and held that in order to fall within the meaning of footnote 2, the

subsequent state claim must be "merely the same . . . in disguise." Three years later, in *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368 (9th Cir.), cert. denied, 484 U.S. 850, 108 S.Ct. 150, 98 L.Ed.2d 106 (1987), the same Court was confronted with facts more akin to those in *Carpenter* where a single plaintiff filed simultaneous actions in federal and state courts.

The *Sullivan* opinion presaged *Carpenter* and reached the correct result on those facts by ordering remand of the state action to state court. 813 F.2d at 1377. The analytical problem with *Sullivan*, however, was that in *dicta* the Court went so far as to suggest, in so many words, that *Moitie* removal could be justified on the basis of an affirmative defense if that defense was based upon the complete preclusion of the state action by the *res judicata* effects of a prior federal judgment. Relying upon *Salveson*, the Court speculated that:

A less expansive explanation for *Moitie*'s use of the artful pleading doctrine is that *Moitie* permits removal only if a federal *res judicata* defense is present.

813 F.2d at 1375.

Perhaps the most interesting thing about the *Sullivan* *dicta* is that the case was decided on April 20, 1987. 813 F.2d at 1368. Less than two months later on June 9, 1987, this Court handed down *Caterpillar, Inc.*, 482 U.S. at 386, 107 S.Ct. at 2425, in which it was made absolutely clear that a federal affirmative defense will not confer removal jurisdiction. 482 U.S. at 396-398, 107 S.Ct. at 2431-2433. Moreover, the *Caterpillar* opinion, which was for a unanimous Court, quoted as authority from Justice Brennan's dissent in *Moitie* itself, where he strongly suggested that the artful pleading doctrine should be confined to "areas of the law pre-empted by federal substantive law". *Id.* at 2432 n. 11, quoting, *Moitie*, 452 U.S. at 410 n. 6, 101 S.Ct. 2433-2424 n. 6.

From the foregoing, it would appear obvious to Petitioners that this Court did indeed eviscerate the *Moitie* footnote, at least insofar as it purports to grant removal jurisdiction on the basis of an affirmative defense based on federal law other than pre-emption. However, this does not appear to be so obvious among the Federal Circuits. For example, both *Carpenter* (44 F.3d at 370 n. 12) and *Rivet* (App. 14-15.) cite *Sullivan* and take at least a substantial portion of their authority from the *Sullivan dicta* discussed above. Similarly, in 1990, the Ninth Circuit again allowed *Moitie* removal based upon an affirmative defense. *Ultramar America Limited v. Dwelle*, 900 F.2d 1412, 1415 (9th Cir. 1990).

The facts of *Ultramar*, however, did at least present an instance where the state-court plaintiff had himself filed the prior federal action, as Judge Jones points out. App. 37 n. 3. But, as Judge Jones also points out, the *Rivet* "majority implicitly acknowledges that while it is not 'constrain[ed]' from allowing *Moitie* removal where the plaintiff has not brought a prior claim, it is broadening the scope of *Moitie* removal beyond what has been allowed in other circuits." *Id.* Petitioners respectfully submit that it is difficult to imagine an extension of the *Moitie* footnote very much beyond where *Rivet* has taken it. As noted, all of the other cases where *Moitie* removal was allowed involved factual situations where the plaintiff had brought the prior action. Nevertheless, the analysis in most, if not all, of these cases is broad enough to take *Moitie* removal to the limits of *Rivet* and beyond.

In *Travelers Indemnity Co. v. Sakrisian*, 794 F.2d 754, 760-761 (2nd Cir.), cert. denied, 479 U.S. 885, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986), for example, the Second Circuit reasoned that *Moitie* removal would be permitted in fact patterns similar to *Sullivan* and *Carpenter* where a plaintiff files simultaneous actions in federal and state courts.

This analysis is obviously beyond that of both *Sullivan* and *Carpenter*, and leaves the door open to take the analysis even beyond *Rivet* to situations where there is no prior federal judgment. For a collection of cases evidencing the expansive rationales assigned to *Moitie* among the several Circuits, the attention of the Court is respectfully directed to footnotes 35 and 36 of the *Rivet* opinion. App. 15, nn. 35 & 36. For a discussion of the very much more limited rationales of the cases upon which the *Moitie* footnote itself relied, the attention of the Court is respectfully directed to footnote 5 of Judge Jones' dissent. App. 38, n. 5.

The analytical quagmire described herein virtually cries out for redress. In effect, based upon the *Moitie* footnote, the several Circuits have developed various rationales for the expansion of removal jurisdiction far beyond, and in direct contravention to, the clear and limited principles of removal jurisdiction articulated by this Court in *Franchise Tax Board, Oklahoma Tax Commission, Caterpillar, Inc.*, and other cases. This flies directly in the face of this Court's command in *Chick Kam Choo* that state courts must apply federal preclusion law. This trend not only confuses and cheapens the law of removal jurisdiction but also runs directly contrary to this Court's narrow and jealously guarded limitations on all federal jurisdiction in general. For a comprehensive analysis of this Court's sixty to seventy year trend of limiting and narrowing the jurisdictional access to federal courts in general, the attention of the Court is respectfully directed to Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 Wake Forest L.Rev. 927 (1996).

CONCLUSION

For the reasons set forth herein, a Writ of Certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

Mary Anna RIVET, Minna Ree Winer,
 Edmond G. Miranne, and Edmond G.
 Miranne, Jr., Plaintiffs-Appellants,

v.

REGIONS BANK OF LOUISIANA, F.S.B.,
 Walter L. Brown, Jr., Perry S. Brown,
 and Fountainbleau Storage Associates,
 Defendants-Appellees.

No. 95-30524.

United States Court of Appeals,
 Fifth Circuit.

March 13, 1997.

Holders of second mortgage on Chapter 7 debtor's leasehold estate brought state court action against successors-in-interest of bank that had purchased leasehold at auction and original lessors' successors-in-interest, to enforce their interest in property. Defendants removed case to federal district court, asserting federal question jurisdiction on theory that prior bankruptcy court orders expressly extinguished holders' rights under second mortgage, and moved for summary judgment. Holders sought remand. The United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., 1995 WL 237019, denied motion to remand, and granted summary judgment for defendants. Holders appealed. The Court of Appeals, Wiener, Circuit Judge, held that: (1) case was properly removed pursuant to res judicata artful pleading exception to well pleaded complaint doctrine; (2) prior bankruptcy court orders authorizing and approving sale of leasehold estate free and clear

of encumbrances barred state action as to bank's successors-in-interest; (3) federal district court had supplemental jurisdiction over original lessors' successors-in-interest, who could not assert res judicata; and (4) original lessors' successors-in-interest were not personally liable to holders for loss of second mortgage.

Affirmed.

Edith H. Jones, Circuit Judge, dissented and filed opinion.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JONES and WIENER, Circuit Judges, and FURGESON,* District Judge.

WIENER, Circuit Judge:

Plaintiffs-Appellants Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne, and Edmond G. Miranne, Jr. (collectively, the Mirannes)¹ appeal the district court's order refusing to remand their case to the Louisiana state court from which it had been removed by Defendants-Appellees Regions Bank, Walter L. Brown, Perry S. Brown, and Fountainbleau Storage Associates (FSA) (collectively, the defendants). The Mirannes also appeal the district court's grant of the defendants' motions for summary judgment dismissing that action. Concluding that

* District Judge of the Western District of Texas, sitting by designation.

¹ Edmond G. Miranne and Mary Anna Rivet are husband and wife, and Edmond G. Miranne, Jr. and Minna Ree Winer are husband and wife.

the district court correctly denied remand under the "artful pleading" exception to the well-pleaded complaint doctrine, we affirm the refusal to remand the Mirannes' suit to state court; and, agreeing that summary judgment of dismissal was providently granted on the basis of claim preclusion, we affirm.

I.

FACTS AND PROCEEDINGS

This action concerns the viability of a \$5,000,000 second mortgage on the interest of the lessee (leasehold estate)² in a parcel of immovable property (leased premises) located at the intersection of Tulane and Carrollton Avenues in New Orleans, Louisiana.³ In 1957, Lois Stern as lessor granted a ground lease of the leased premises to Pelican State Hotel Corporation as lessee. As a result of

² "Leasehold estate" is a term unknown to the Civil Law, which does not recognize estates in land. See A.N. Yiannopoulos, 2 *Louisiana Civil Law Treatise* § 226 at 422-23 (3d ed.1991). In Louisiana, a lease of immovable (real) property is a personal (in personam) contract which does not create rights in rem; however, under provisions of various statutes, both predial (real estate) and mineral leases are afforded some of the attributes of rights *in rem*, notably the protection of the public records doctrine, including the susceptibility of the rights of the lessee to conventional (real estate) mortgages and the ranking of such encumbrances among themselves based on time of recordation. See *id.*, at 424-25, and also La.Rev.Stat. Ann. §§ 2721 & 2754-56 (West 1991).

³ The location of the leased premises is a legendary one to many New Orleanians. For years the property was the site of Pelican Stadium, the home field of the old New Orleans Pelicans minor league baseball team.

several subsequent assignments, the leasehold estate was eventually acquired by Tulane Hotel Investors Limited Partnership (THILP) on September 15, 1983. On the same date, THILP granted a collateral mortgage (first mortgage) encumbering the leasehold estate to secure a \$15,000,000 collateral mortgage note, which in turn was pledged as collateral on a loan from First Financial Bank (FFB).⁴ In May of the following year, THILP granted another collateral mortgage (second mortgage) on the leasehold estate, this one to secure a \$5,000,000 collateral mortgage note pledged to and held by the Mirannes.⁵

In 1985, little more than a year after granting the second mortgage, THILP filed for protection under Chapter 11 of the Bankruptcy Code. The bankruptcy was later converted to a Chapter 7 proceeding and a trustee was appointed. In the spring of 1986, the trustee applied for court approval to sell the leasehold estate at public auction, free and clear of essentially all encumbrances, specifically including the second mortgage.⁶ The bankruptcy court issued an order advising all creditors and parties in interest who might oppose the proposed sale to serve any

⁴ See Max Nathan, Jr., *The Collateral Mortgage, Logic and Experience*, 49 La. L.Rev. 39 (1988), for a discussion of the collateral mortgage, that unique Louisiana "hybrid security device, combining the elements of both pledge and mortgage." *Id.* at 39-40.

⁵ One of the holders of the note, Edmond G. Miranne, Jr., also appears to have been a partner of THILP.

⁶ At this point, the leasehold estate consisted principally of the Bayou Plaza Hotel, formerly known as the Fountainbleau Hotel.

objections to the sale on the trustee and file such objections with the court by June 12, 1986. The court also set June 16, 1986 as the date for a hearing on the trustee's application. At the hearing, plaintiff Edmond G. Miranne, Jr., an attorney-at-law, appeared on behalf of himself, pro se, and his father, plaintiff Edmond G. Miranne, as holders of the note secured by the second mortgage. Their respective wives, plaintiffs Minna Ree Winer and Mary Anna Rivet, did not appear in person; neither were they identified by name as being represented by Miranne, Jr.

On the day after the hearing, the bankruptcy court granted the sale application and ordered that the leasehold estate be sold free and clear of virtually all liens and encumbrances, expressly identifying the second mortgage held by the Mirannes as one of the myriad encumbrances to be canceled. As no appeal was taken from that order, the trustee proceeded with the public auction of the leasehold estate. At the auction, FFB, the holder of the first mortgage, submitted the only bid. Approximately two months later, the bankruptcy court approved the auction results, directed that the sale of the leasehold estate to FFB be consummated, and ordered the Recorder of Mortgages for Orleans Parish to cancel the liens and encumbrances listed, which expressly included the second mortgage held by the Mirannes. Despite the bankruptcy court's order, however, the second mortgage was, for some as yet unexplained reason, never canceled and remained inscribed on the public records of Orleans Parish.

Secor Bank eventually succeeded FFB as owner of the leasehold estate. In December 1993, Defendants-

Appellees Walter L. Brown and Perry S. Brown, successors-in-interest to the original lessors, sold the leased premises to Secor, thereby vesting Secor with perfect ownership of the leased premises.⁷ Later the same day, Secor in turn conveyed its newly acquired full ownership in the leased premises to FSA, which remained the record owner as of the commencement of the instant litigation. Secor was thereafter succeeded by Regions.

A year later, the Mirannes filed this suit in Louisiana state court against the defendants, alleging that the December 1993 transactions – in which the Browns conveyed their interest in the leased premises to Secor (which already owned the leasehold estate), and Secor in turn conveyed the leased premises in full ownership to FSA – had the net effect of canceling the lease and thereby abrogating the Mirannes' purported rights under the second mortgage which, they alleged, still encumbered the leasehold estate. The Mirannes sought (1) to have the second mortgage recognized and enforced, via ordinaria, against the immovable property located on the leased premises, or (2) alternatively, damages. In their complaint, the Mirannes assiduously avoided any hint of

⁷ Under Louisiana Civil Code Article 1903, an obligation may be extinguished by "confusion" when the qualities of obligee and obligor are united in the same person. Thus when a lessor's interest and a lessee's interest in the same immovable property are consolidated in the same person, the lease ceases to exist and the person vested with both interests will hold perfect or full ownership – essentially the equivalent of "fee simple" title in the common law. See *Ranson v. Voiron*, 176 La. 718, 146 So. 681, 682 (1931).

the previous bankruptcy proceedings and orders affecting the leased premises, the leasehold estate, and their second mortgage against it.

The defendants removed the case to federal district court, asserting federal question jurisdiction on the theory that the 1986 bankruptcy court orders expressly extinguished the Mirannes' rights under the second mortgage. Following removal, Regions and FSA filed motions for summary judgment asserting, *inter alia*, claim preclusion based on the bankruptcy court's orders. The Browns also filed for summary judgment adopting Regions and FSA's claim preclusion defense and asserting, as a separate and independent basis for dismissal, the Mirannes' failure to state a cause of action against the Browns. More or less simultaneously, the Mirannes sought remand, contending that the bankruptcy court orders at most provided defendants with an affirmative defense and thus could not confer removal jurisdiction. The district court denied the Mirannes' motion to remand, relying primarily on the principles announced by this court in *Carpenter v. Wichita Falls Independent School District*.⁸ At the same time, the court granted summary judgment in favor of FSA and Regions on claim preclusion grounds, and in favor of the Browns on their separate and independent grounds. The Mirannes timely filed a notice of appeal from these rulings.

⁸ 44 F.3d 362 (5th Cir.1995).

II.
ANALYSIS

A. Removal Jurisdiction – Basic Principles

We have recently reviewed the well established principles governing federal question removal jurisdiction.⁹ The denial of a motion to remand an action removed from state to federal court presents a question of federal subject matter jurisdiction and statutory construction which we review *de novo* on appeal.¹⁰ As a defendant's use of the removal statute¹¹ deprives a state court of a case properly before it and thereby implicates concerns of federalism, that statute must be strictly construed.¹² It follows that the defendant who seeks to sustain removal must also bear the burden of establishing federal jurisdiction over the subject matter of the state court suit.¹³

As a general proposition, removal hinges on whether a federal district court could have asserted original jurisdiction over the state court action had it initially been filed in federal court.¹⁴ When a defendant seeks to remove a state court suit on the basis of federal question

jurisdiction, as was the case here, removal will be appropriate only if the action is one "arising under the Constitution, laws or treaties of the United States."¹⁵ In most cases, a defendant's assertion of federal question removal jurisdiction will rise or fall on the allegations in the plaintiff's "well-pleaded complaint,"¹⁶ that is, on whether "there appears on the face of the complaint some substantial, disputed question of federal law."¹⁷ This means that the defendant must predicate his assertion of federal jurisdiction on the allegations of the plaintiff's claim, not, for example, on the basis of an anticipated or even an inevitable federal defense.¹⁸ As Justice Cardozo succinctly put it, the defendant must show that a federal right is "an element, and an essential one, of the plaintiff's cause of action."¹⁹

B. Artful Pleading Exception – Federal Res Judicata

Federal courts have over the years created but a few narrow exceptions to the fundamental precept of the well-pleaded complaint doctrine that "[t]he plaintiff is master of her complaint."²⁰ The common rationale for

¹⁵ 28 U.S.C. §§ 1331 & 1441(b).

¹⁶ *Carpenter*, 44 F.3d at 366 (citing *Louisville & Nashville R. Co. v. Motley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908)).

¹⁷ *Carpenter*, 44 F.3d at 366 (citing *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12, 103 S.Ct. 2841, 2848, 77 L.Ed.2d 420 (1983)) (emphasis added).

¹⁸ *Carpenter*, 44 F.3d at 366.

¹⁹ *Gully v. First Nat'l Bank*, 299 U.S. 109, 112, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936).

²⁰ *Carpenter*, 44 F.3d at 366.

⁹ See *id.* at 365-67.

¹⁰ *Garrett v. Commonwealth Mortgage Corp. of America*, 938 F.2d 591, 593 (5th Cir.1991).

¹¹ 28 U.S.C. § 1441.

¹² *Carpenter*, 44 F.3d at 365-66.

¹³ *Id.* at 365.

¹⁴ See 28 U.S.C. § 1441(a).

these jurisprudential exceptions – euphemistically known by the cynically sarcastic sobriquet of the “artful pleading exception” – is that when a plaintiff has available “no legitimate or viable state cause of action, but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising exclusively under state law.”²¹

The first and best known specie of artful pleading is the one that arises when the area of state law upon which a plaintiff’s claim is based has been “completely pre-empted” by federal law; i.e., when the “pre-emptive force of a statute is so ‘extraordinary’ that it ‘converts an ordinary state law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.’ ”²²

²¹ *Id.* We note that another jurisprudentially created doctrine, more frankly labeled “fraudulent joinder,” supports the assertion of removal jurisdiction on the basis of diversity of citizenship when a plaintiff’s well-pleaded complaint would not otherwise allow removal because of the joinder of a non-diverse defendant. Even though we give great deference to the allegations found in the plaintiff’s state court complaint, we will nevertheless examine the questioned joinder of a non-diverse defendant and hold it to be fraudulent under this doctrine when there is no possibility of recovery against that party. *See Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir.1992); *Carriere v. Sears Roebuck and Co.*, 893 F.2d 98, 100 (5th Cir.1990). The parallel between the fraudulent joinder exception and the artful pleading exception should be obvious.

²² *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393, 107 S.Ct. 2425, 2430, 96 L.Ed.2d 318 (1987) (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65, 107 S.Ct. 1542, 1547, 95 L.Ed.2d 55 (1987)).

Only a few types of claims have been held to be “completely pre-empted,” though – most notably those pre-empted by Section 302 of the Labor Management Relations Act of 1947 or by Section 502 of the Employment Retirement Income Security Act of 1974.²³

A second and somewhat rarer specie of artful pleading that justifies an exception is the one exemplified by the case we consider today, as illustrated in *Federated Department Stores v. Moitie*²⁴ – claim preclusion or res judicata. In *Moitie*, seven plaintiffs had filed and lost a consolidated antitrust suit in federal court.²⁵ Five of the seven plaintiffs appealed the district court decision, but two (Brown and Moitie) elected to file almost identical second suits (*Brown II* and *Moitie II*) in state court, facially based exclusively on state law. After the defendants removed these two state court suits, Brown and Moitie sought remand to state court. The district court first denied Brown’s and Moitie’s motions to remand, finding that their state court actions “were properly removed to federal court because they raised ‘essentially federal law’

²³ See *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n. of Machinists*, 390 U.S. 557, 559, 88 S.Ct. 1235, 1237, 20 L.Ed.2d 126 (1968) (§ 302 of LMRA); *Metropolitan Life*, 481 U.S. at 65-66, 107 S.Ct. at 1547-48 (§ 502 of ERISA).

²⁴ 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981).

²⁵ Six of the plaintiffs had originally filed their suits in federal court, and one plaintiff who originally filed suit in state court saw his action removed to federal court on federal question and diversity jurisdiction grounds. The district court found that all of the plaintiffs had failed to allege an “injury” to their “property or business” within the meaning of § 4 of the Clayton Act, 15 U.S.C. § 15. *Id.* at 395-96.

claims," then dismissed the claims on res judicata grounds.²⁶

In the meantime, the Ninth Circuit had ruled in favor of the other original federal plaintiffs – the five who had appealed their district court losses – based on a supervening Supreme Court decision that had worked a substantive change in pertinent antitrust law. Consequently, when the two state court plaintiffs, Brown and Moitie, appealed the district court's denial of their motions to remand and its subsequent dismissals for res judicata, the Ninth Circuit reversed the district court on the merits of its res judicata determination, but – importantly – only after affirming the district court's assertion of removal jurisdiction and denial of remand.²⁷ The Supreme Court then granted *certiorari* to consider, specifically, the preclusion issues raised by the Ninth Circuit's res judicata analysis.²⁸

Although the Supreme Court's decision was primarily focused on the substantive preclusion issues thus presented, the Court, of necessity, also affirmed the district courts' original assertion of removal jurisdiction over *Brown II* and *Moitie II* and the Ninth Circuit's affirmation of that jurisdiction. In a lengthy footnote, the Court stated:

The Court of Appeals also affirmed the District Court's conclusion that *Brown II* was properly

²⁶ *Id.* at 396-97.

²⁷ *Id.* at 397-98.

²⁸ *Id.* at 398 ("We granted certiorari . . . to consider the validity of the Court of Appeals' novel exception to the doctrine of res judicata.").

removed to federal court, reasoning that the claims presented were "federal in nature." We agree that at least some of the claims had a sufficient federal character to support removal. As one treatise puts it, courts will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and that] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization. 14 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3722, pp. 564-566 (1976) (citing cases) (footnote omitted). The District Court applied that settled principle to the facts of this case. . . . We will not question here that factual finding.²⁹

Regrettably, the Supreme Court did not explain precisely what there was about the plaintiffs' state law claims that was so "federal in nature" as to support removal under the artful pleading exception.

Even though at least one district court and one commentator have suggested that *Moitie* should be disregarded either as an aberration that has never been confirmed by the Supreme Court or as an injudicious application of an already suspect doctrine,³⁰ the circuit courts have nevertheless attempted, as they must, to find

²⁹ *Id.* at 397 n. 2 (emphasis added).

³⁰ See *Magic Chef, Inc. v. Int'l Molders & Allied Workers Union*, 581 F.Supp. 772, 776 n. 4 (E.D. Tenn. 1983) (claiming that *Moitie*'s value as authority regarding removal jurisdiction was superseded by the Supreme Court's opinion in *Franchise Tax Bd.*, which was written by Justice Brennan, a vocal dissenter in *Moitie*, and which does not cite *Moitie* at all); Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 Hastings L.J. 273, 303-315 (1993).

meaning in *Moitie's* enigmatic footnote. As it happens, different circuits have articulated one or the other of two distinct rationales for the Supreme Court's use of the artful pleading exception in its approval of the district court's denial of remand in *Moitie*.

One rationale was offered in *Travelers Indemnity Co. v. Sarkisian*,³¹ in which the Second Circuit interpreted *Moitie* to permit removal whenever a plaintiff files a complaint based on federal law in federal court and subsequently files an ostensible state law claim in state court containing essentially the same elements. Consistent with the well-pleaded complaint doctrine, this "election of forums" or "consent" rationale recognizes in essence that a plaintiff remains the master of his complaint, but engrafts on this doctrine the limitation that the plaintiff is allowed but one opportunity to characterize his claims.³²

Reasoning that the Second Circuit's "election of forums" rationale would lead to an unwarranted and excessive expansion of federal removal jurisdiction, the Ninth Circuit, in *Sullivan v. First Affiliated Securities, Inc.*,³³ concluded that *Moitie* is better explained as permitting removal of only those subsequent state court claims that are barred by the res judicata effect of a prior federal

³¹ 794 F.2d 754, 760-61 (2nd Cir.), cert. denied, 479 U.S. 885, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986).

³² See *Ragazzo*, 44 Hastings L.J. at 307-308.

³³ 813 F.2d 1368, 1374-75 (9th Cir.), cert denied, 484 U.S. 850, 108 S.Ct. 150, 98 L.Ed.2d 106 (1987) (critiquing the election of forums rationale as applied in *Sarkisian* and as discussed in dicta of an earlier Ninth Circuit decision, *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423 (9th Cir.1984)).

judgment.³⁴ As the Ninth Circuit later put it, a plaintiff's state law claim may be classified as "'artfully pleaded' when it is drafted to avoid stating allegations or claims already resolved by a prior federal judgment."³⁵ In a number of subsequent cases, the Ninth Circuit, as well as other circuits, have endorsed *Sullivan's* articulation of this "federal res judicata" rationale for *Moitie* and have applied *Sullivan's* principles, all the while recognizing that this additional branch of the artful pleading exception must be used sparingly, in the narrow and exceptional circumstances described by *Sullivan* and *Moitie*.³⁶

³⁴ *Id.* at 1376 ("We therefore construe *Moitie* as limited to removal of state claims precluded by the res judicata effect of a federal judgment.").

³⁵ *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1403 (9th Cir.1988); see also *Clinton v. Acequia, Inc.*, 94 F.3d 568, 571 (9th Cir.1996) (stating that Ninth Circuit has consistently "found the artful pleading doctrine to support removal where a plaintiff files his state law claims in state court in an attempt to circumvent the res judicata effect of a prior federal claim that has been reduced to judgment").

³⁶ See e.g., *Ultramar America Limited v. Dwelle*, 900 F.2d 1412, 1415 (9th Cir.1990) (acknowledging that *Sullivan* recognized a new basis for invoking the artful pleading doctrine but noting that recharacterization of a state court claim under the res judicata branch of the doctrine may only occur when prior federal judgment resolved issues of federal not state law); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 912 (7th Cir.1993) (recognizing *Ultramar* distinction but also finding that removal was improper because no res judicata was present); *Ethridge*, 861 F.2d at 1403 (endorsing *Sullivan* but finding that removal was improper because federal court lacked subject matter jurisdiction over complaint in prior and allegedly preclusive federal action); *Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 908 F.2d 477, 480 (9th Cir.1990) (applying *Sullivan* rule but holding that

In *Carpenter v. Wichita Falls Ind. School District*,³⁷ a panel of this court squarely confronted the same interpretive issue presented to the Ninth Circuit by *Sullivan*.³⁸ Explicitly rejecting the Second Circuit's expansive election of forums approach and agreeing with the Ninth Circuit's "narrower interpretation,"³⁹ we concluded in *Carpenter* that the "federal character" of the plaintiffs' claims justifying removal in *Moitie* must be found in the federal law of preclusion.⁴⁰ In so doing we were careful to reiterate our continuing confidence that state courts would comply with their Supremacy Clause obligation to apply federal rules of *res judicata*.⁴¹

In addition, we emphasized our awareness that defendants in state court suits frequently have the option of employing the relitigation exception to the Anti-

removal was improper because plaintiff's claim had never previously been before a federal court and no *res judicata* defense was available to defendants).

³⁷ 44 F.3d 362 (5th Cir.1995).

³⁸ In *Carpenter*, the plaintiff, a school administrator, filed two separate suits against the school district she worked for – one in federal court alleging violations of her free speech rights under the First Amendment to the United States Constitution and one in state court stating a state contract claim and a free speech claim exclusively under the Texas Constitution. 44 F.2d at 365. Similarly, *Sullivan* involved a federal action under federal securities law and another similar and simultaneous action in state court under state securities law. 813 F.2d at 1370.

³⁹ *Carpenter*, 44 F.3d at 369 n. 6, 370 n. 12.

⁴⁰ *Id.* at 370.

⁴¹ *Id.*

Injunction Act,⁴² as an alternative approach to disposing of a state court suit that is precluded by a prior federal judgment. The fact that a defendant could seek to enjoin a state court action and thereby, if successful, achieve the same result that he might have obtained had he instead sought to remove and dismiss the suit under *Moitie*, does not, Judge Garwood expressly observed in *Carpenter*, render *Moitie* superfluous. Rather, Judge Garwood went on to explain, the co-extensive nature of the relitigation exception to the Anti-Injunction Act on the one hand and the artful pleading exception to the well-pleaded complaint doctrine – based on *Moitie*'s federal *res judicata* grounds – on the other hand simply suggests that "any potential impact on federalism from removal [in *Moitie*] was not significant."⁴³ In thus clearly setting forth the rule for this circuit, the *Carpenter* panel concluded by stating that:

[w]e hold that *Moitie* should apply only where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law.⁴⁴

Returning to the case now before us, we conclude that the district court properly reasoned that *Carpenter*'s holding provides the sole framework for analyzing the jurisdictional issues raised by the Mirannes' thinly veiled

⁴² 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a state court except . . . to protect or effectuate its judgments.") (emphasis added).

⁴³ *Id.*

⁴⁴ *Id.* (emphasis added).

collateral attack on the bankruptcy court's prior orders. The fact that in *Carpenter* the federal res judicata artful pleading rationale did not, in the end, support removal under the specific circumstances of that case – there was no prior federal case and no prior federal judgment, just two simultaneously filed suits, one based on federal law and one scrupulously – "artfully" – based solely on state law – does not, as the Mirannes now contend, render Judge Garwood's carefully articulated holding in *Carpenter* dicta. To the contrary, and just as the district court here found, *Carpenter* controls. Accordingly, if the defendants can show that the Mirannes' state court suit, purportedly brought to enforce their erstwhile second mortgage, is in fact barred by the claim preclusive effects of the bankruptcy court's 1986 orders that authorized and approved the sale of the leasehold estate free and clear of that mortgage and mandated its cancellation, then the district court's denial of the Mirannes' motion to remand, and its dismissal of their suit for essentially the same reason, must be affirmed.

C. The Bankruptcy Court's 1986 Orders Bar the Mirannes' Present Suit

Under the "pure" res judicata or claim preclusion rubric as developed in this circuit, a prior judgment will operate to preclude a later filed suit if four elements are present: (1) The parties in the later action are identical to, or at least in privity with, the parties in the prior action; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action concluded with a final judgment on the merits; and (4) the

same claim or cause of action is involved in both actions.⁴⁵ As we find beyond peradventure that all four elements subsist in the instant case, we conclude, just as did the district court, that the claims presented by the Mirannes' subsequent state court action, ostensibly seeking to enforce their second mortgage, are in fact precluded by the bankruptcy court's 1986 orders.

1. Identity and Privity of the Parties

The bankruptcy court's order authorizing the sale of the leasehold estate reflects that Edmond G. Miranne Jr., an attorney-at-law, appeared in court on the previous day, both pro se and as counsel for his father, in connection with the pending sale application by the trustee. The fact that the Mirannes' wives, Rivet and Winer,⁴⁶ did not personally appear and were not expressly identified by Miranne Jr. as parties that he represented, is of no significance. We have previously held that one individual's participation in a bankruptcy proceeding may bind a non-party, such as a spouse, whose interests are closely aligned with and adequately represented by the person who did appear.⁴⁷ Here, Rivet and Winer had interests identical to those of their husbands in the bankruptcy proceeding – namely the preservation (more accurately

⁴⁵ *United States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir.1994).

⁴⁶ In Louisiana, married women are entitled to retain and use their maiden names, and frequently do so in legal documents, such as deeds, mortgages, and pleadings, especially in New Orleans and the "country parishes" of South Louisiana. See La. Civ.Code art. 100.

⁴⁷ *Eubanks v. F.D.I.C.*, 977 F.2d 166, 170 (5th Cir.1992).

here, the resurrection) and protection of the second mortgage. In fact, their subsequent state court complaint listed only the husbands as owners of the collateral mortgage note, even though it was presumptively community property under Louisiana law.⁴⁸ Consequently, the husbands' participation in the 1986 bankruptcy proceedings by way of Edmond G. Miranne, Jr.'s appearance at the sale application hearing served as adequate representation of the interests of the spouses in community and was thus no less binding on the wives for claim preclusion purposes than it was on their husbands.⁴⁹

With respect to the defendants, there is no dispute that FFB was a party to the bankruptcy proceedings as holder of the first mortgage and the eventual purchaser of the leasehold estate at the public auction. Neither is there doubt that Regions and FSA are successors-in-interest to FFB with respect to the property affected by the

⁴⁸ See La. Civ.Code art. 2340 ("Things in possession of a spouse during the existence of a regime of community of acquests and gains are presumed to be community, but either spouse may prove that they are separate property.").

⁴⁹ Under Louisiana's community property laws, the rule of equal management generally applies to community property; however, the concurrence of both spouses is required for the alienation, encumbrance or lease of community immovables and in other limited situations specified by law. La. Civ.Code arts. 2346-47. As the collateral mortgage note held by the Mirannes is classified as an "incorporeal movable," concurrence of the Mirannes' spouses would not have been required for the husbands to alienate whatever rights flowed from their ownership of the note and the mortgage securing it. See Nathan, 49 La. L.Rev. at 44.

bankruptcy court orders. Again, the rule is well established that a judgment may have claim preclusive effect on a non-party if the non-party is a successor-in-interest to a party's interest in property affected by the judgment.⁵⁰ Consequently, both Regions and FSA are bound by the bankruptcy court's orders to the same extent as is their predecessor, First Financial. Accordingly, we conclude that the first element of claim preclusion is clearly satisfied in this case with respect to all four plaintiffs and to defendants Regions and FSA.⁵¹

2. A Court of Competent Jurisdiction and A Final Judgment

The second and third claim preclusion elements are also present in the instant case. As a general proposition, district courts have jurisdiction over cases or civil proceedings arising under Title 11, or arising in or related to cases under Title 11.⁵² It follows that a district court has jurisdiction to authorize and approve a trustee's sale.⁵³

⁵⁰ *Meza v. General Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir.1990); *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 188 (5th Cir.1990).

⁵¹ We acknowledge that this first condition of claim preclusion cannot be satisfied with respect to the Browns, but we dispose of the jurisdictional wrinkle raised by this fact below. See *infra* Part E.

⁵² 28 U.S.C. § 1334(a),(b).

⁵³ *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 870 (5th Cir.1984); *In re Heine*, 141 B.R. 185, 187 (Bank.D.S.D.1992); see also *Matter of Baudoin*, 981 F.2d 736, 740 (5th Cir.1993) (recognizing wide reach of jurisdiction under Title 11).

Indeed, a proceeding to sell property free and clear of liens pursuant to 11 U.S.C. § 363(b) and (f) is a core proceeding in which the bankruptcy court has jurisdiction to issue final orders and judgments.⁵⁴ Here the proposed sale of the leasehold interest arose under and was related to THILP's chapter 7 bankruptcy case. Consequently, the bankruptcy court had jurisdiction to consider the Trustee's sale application and to issue the ensuing orders (1) authorizing the sale of the leasehold estate free and clear of specified junior liens, expressly including the second mortgage held by the Mirannes, and (2) approving that sale and directing the cancellation of those specified inferior encumbrances.

Although they characterize the bankruptcy court's sale orders as actions beyond the "power" of the bankruptcy court under the rules and provisions of the Bankruptcy Code,⁵⁵ the Mirannes' authority for this proposition does not comport with Congress' jurisdictional grant to the district court – and its adjunct, the bankruptcy court – to determine whether property of a debtor should be sold free and clear of liens and encumbrances. The Mirannes, of course, were entitled to question whether the bankruptcy court properly exercised the powers granted to it by 11 U.S.C. § 363 in the

⁵⁴ 28 U.S.C. § 157(a),(b)(2)(N); *Heine*, 141 B.R. at 188.

⁵⁵ Appellants principally contend that the bankruptcy court order extinguishing the second mortgage was invalid because the order did not result from an adversary proceeding as required by Fed. R. Bank. Proc. 7001 and because the court did not satisfy the provisions of § 363(f)(1)-(5).

particular circumstances of this case. This kind of substantive – but *not* jurisdictional – objection to a bankruptcy court's orders, however, is one that had to have been timely raised either in an appeal or a motion for reconsideration, not eight years after the fact in a state court collateral attack on those orders. We reject out of hand the Mirannes' specious contention that, for claim preclusion purposes, the bankruptcy court lacked jurisdiction to issue the 1986 sale orders.

In addition, an order by a bankruptcy court authorizing or approving the sale of an asset of the bankrupt estate is a final judgment on the merits for res judicata purposes even if the order neither closes the bankruptcy case nor disposes of any claim.⁵⁶ Therefore, there can be no serious question that the bankruptcy court's 1986 orders authorizing and approving the sale of the leasehold estate free and clear of essentially all liens and encumbrances were final judgments capable of precluding the Mirannes' later filed state court collateral attack. It is equally beyond serious question that these final judgments affected issues of federal law: Bankruptcy is a quintessential federal question.

3. *The Same Cause of Action*

In conducting our search for the presence of the fourth element required for the applicability of claim preclusion, we employ the transactional test of Section 24

⁵⁶ *Matter of Baudoin*, 981 F.2d at 742; *Hendrick v. Avent*, 891 F.2d 583, 586 (5th Cir.), cert. denied, 498 U.S. 819, 111 S.Ct. 64, 112 L.Ed.2d 39 (1990); *Southmark Properties*, 742 F.2d at 870.

of the *Restatement (Second) of Judgments* to determine whether the two suits in question involve the same claim for purposes of claim preclusion.⁵⁷ Under the "same claim" inquiry, the critical issue is whether the two actions under consideration are based on the *same nucleus of operative facts*.⁵⁸

In the instant case, we find that both the bankruptcy court's 1986 orders authorizing and approving the sale of the leasehold estate free and clear of the Mirannes' second mortgage and the Mirannes' claims in their state court action are unquestionably based on, and in fact are entirely dependent on, the same nucleus of operative facts – namely, the viability, the validity, the enforceability of the second mortgage. In "artfully" contending that their putative state cause of action arises solely out of the December 1993 transaction involving the Browns, Secor and FSA, the Mirannes studiously ignore the fact their claim relative to that 1993 transfer can go absolutely nowhere unless they can establish that their second mortgage was alive and well at that time, despite the 1986 bankruptcy court orders that expressly authorized and approved the sale of the leasehold estate free and clear of that mortgage and directed that it be canceled from the mortgage records of Orleans Parish.

Without an extant enforceable mortgage, the Mirannes cannot forthrightly plead either a right of action or a cause of action in state court. Indeed, all of the acts of

⁵⁷ *Matter of Baudoin*, 981 F.2d at 743; *Southmark Properties*, 742 F.2d at 870-71.

⁵⁸ *Matter of Baudoin*, 981 F.2d at 743.

alleged wrongdoing in the December 1993 transaction are so inextricably intertwined with and dependent on the 1986 bankruptcy orders directing and approving the sale of the leasehold estate free and clear of the second mortgage that we would be hard pressed to conjure up a better hypothetical example of two actions arising from the same nucleus of operative facts. In this regard we remain ever mindful of the basic canon of Louisiana law that the public records do not create rights; the existence of the uncanceled *inscription* of the second mortgage on the public records could not keep the mortgage itself legally viable after the obligation it secured – the collateral mortgage note – as well as the mortgage, were terminated in the bankruptcy of the maker/mortgagor, THILP.

A review of relevant case law applying *res judicata* principles in the bankruptcy context further confirms our analysis. On one hand, our decisions have consistently held that under the transactional test a final bankruptcy court *sale* bars any subsequent claims that challenge the finality or integrity of the transfer of title pursuant to that sale.⁵⁹ On the other hand, the Mirannes' reliance on *D-1 Enterprises, Inc. v. Commercial State Bank*,⁶⁰ a case in which we held that *res judicata* does *not* apply to claims that

⁵⁹ See *Southmark Properties*, 742 F.2d at 870-72 (debtor's later filed lender liability action barred by bankruptcy court's order authorizing sale of property in debtor's estate "free and clear of all . . . claims" to secured creditor as both involved "common nucleus of operative facts"); *Hendrick*, 891 F.2d at 587 (trustee's actions under RICO and securities laws barred by bankruptcy court's sale order authorizing transfer of title of stock against which trustee had launched his collateral action).

⁶⁰ 864 F.2d 36 (5th Cir.1989).

were largely unrelated to and which could not have been raised in an earlier bankruptcy proceeding, is inapposite to the instant case. Unlike the situation in *D-1 Enterprises*, here the Mirannes had far more than a mere opportunity to object to the sale of the leasehold estate in the bankruptcy court: They were invited by the court to file their objections; they actually appeared in court at the hearing scheduled for the airing of such objections; and once the court issued its sale order, they could have timely filed either a motion for reconsideration – or a notice of appeal – but they did neither. Given their personal attendance, together with these multiple waived or forfeited opportunities to raise and litigate their objections (if any) to the sale, the Mirannes cannot now contend – at least not with a straight face – as did the debtor in *D-1 Enterprises*,⁶¹ that claim preclusion should not be applied because their claim could not have been effectively litigated in the earlier proceeding.

Indisputably, all requisites of claim preclusion are present here, vis-à-vis Regions and FSA. As to these two defendants, therefore, we affirm the district court's refusal to remand the Mirannes' previously removed action under the artful pleading exception to the well-pleaded complaint doctrine.

⁶¹ In *D-1 Enterprises*, we found that the lender liability claims that debtor sought to assert in the later action were not "direct defenses" that the debtor could or should have litigated in response to the creditor's earlier motion for relief from stay. *Id.* at 39. Furthermore, *D-1 Enterprises* also distinguished *Southmark* in which preclusion was appropriate in the context of a "court-ordered public cash auction." *Id.*

D. The "Actually Litigated" Standard

As we noted above, and as this court previously observed in *Carpenter*, the relitigation exception to the Anti-Injunction Act provides another, entirely independent mechanism which defendants (and the federal courts) may use to protect prior federal court judgments.⁶² In *Carpenter* we reasoned that, as the relitigation exception to the Anti-Injunction Act had "already realigned federal-state relations in favor of the federal courts," *Moitie*'s use of the res judicata branch of the artful pleading exception signified nothing more than that "any potential impact on federalism from removal was not significant."⁶³ Thus two lessons are to be gleaned from *Carpenter*: (1) Issues of federalism are not implicated in this context; and (2) the relitigation exception to the Anti-Injunction Act – a route that parallels (but is not identical to) removal via the res judicata iteration of the artful pleading exception – is not the exclusive path available for squelching precluded sequential state court litigation of claims previously litigated in federal court.

Nevertheless, in reliance on the above-quoted limited discussion of how the Anti-Injunction Act co-exists with the federal res judicata interpretation of *Moitie*, the Mirannes imaginatively contend that the court in *Carpenter* implicitly incorporated the specific restraints of the relitigation exception into its res judicata artful pleading exception based on *Moitie*. In particular, they contend that removal under *Carpenter* is somehow limited by the

⁶² See *supra* Part B, and 44 F.3d at 370.

⁶³ *Id.*

anti-injunction holding in *Chick Kam Choo v. Exxon Corp.*⁶⁴ The Mirannes argue that *Chick Kam Choo* stands for the proposition that injunctions may be issued under the relitigation exception to § 2283 only with respect to issues that were “actually litigated” in the prior proceeding – that is, only in circumstances in which *issue* – but not claim – preclusion would apply in a successive proceeding; and that such a limitation must per force restrict the artful pleading exception to issue preclusion. This stretch by the Mirannes, in attempting to incorporate an “actually litigated” restriction into *Carpenter*, is fatally flawed, however.

First, we note that nowhere in *Carpenter* did we even mention, much less impose, an “actually litigated” standard for removal under the res judicata branch of the artful pleading exception; neither did we so much as refer to *Chick Kam Choo*, much less cite it as authority. Second, we are aware of no other court that, when applying the federal res judicata manifestation of the artful pleading exception following *Sullivan*, has seen fit to apply – or even mention – this standard.

But even if we assume, solely for the sake of argument, that an “actually litigated” requirement was imported through *Carpenter*, we would still find that removal is proper under the circumstances of this case. In *Chick Kam Choo*, the Supreme Court, relying on *Atlantic Coast Line R. Co. v. Locomotive Engineers*,⁶⁵ stressed that:

⁶⁴ 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988).

⁶⁵ 398 U.S. 281, 286-287, 90 S.Ct. 1739, 1742-43, 26 L.Ed.2d 234 (1970).

an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings *actually have been decided* by the federal court. Moreover, *Atlantic Coast Line* illustrates that this prerequisite is strict and narrow. The court assessed the precise state of the record and what the earlier federal order *actually said*; it did not permit the District Court to render a post hoc judgment as to what the order was *intended* to say.⁶⁶

For the bankruptcy court in the instant case to authorize and approve the sale of the leasehold estate free and clear of essentially all liens and encumbrances, that court necessarily had to *decide* whether the Mirannes’ inferior second mortgage could survive as an encumbrance against the leasehold estate after that estate was sold at public auction by the THILP trustee’s foreclosure on the superior first mortgage. Indeed, the bankruptcy court’s order authorizing sale of the leasehold estate “*actually said*,” *inter alia*, that (1) Edmond G. Miranne, Jr. appeared on his and his father’s behalf, (2) all creditors were given notice and an opportunity to object and be heard, and (3) the sale of the leasehold estate would be free and clear of “all . . . liens, mortgages and encumbrances,” including, specifically, the Mirannes’ second mortgage. Given *Chick Kam Choo*’s admonition to focus on “what the earlier federal order *actually said*,” not what “the order *intended to say*” (albeit likely the same thing in this case), it is

⁶⁶ *Chick Kam Choo*, 486 U.S. at 148, 108 S.Ct. at 1690-91 (emphasis in original).

indisputable that in the 1986 bankruptcy court proceedings the continuing validity of the Mirannes' inferior mortgage was "actually litigated and decided."⁶⁷

E. Response to Dissent

Although our colleague, Judge Jones, in her thoughtful dissent agrees with our essential holding that *Moitie* permits removal of state court claims that are barred by the preclusive res judicata effect of a prior federal judgment, she would further limit application of *Moitie*'s res judicata removal avenue to cases in which (1) "the prior judgment . . . involved a claim made under federal law," and (2) "the claim being removed represented a plaintiff's attempt to seek relief in state court by recharacterizing an 'essentially federal' claim they [sic] had unsuccessfully pursued first in federal court."⁶⁸ We acknowledge the overarching federalism concerns that inform Judge Jones' critique, but we nevertheless find her additional suggested restrictions to our already narrow holdings in *Carpenter* and in the instant case to be unwarranted. First, the Ninth Circuit decision that Judge Jones cites in support of her additional restrictions, *Ultramar America Limited v. Dwelle*,⁶⁹ limits *Moitie* recharacterization (i.e., removal) to situations "when the prior federal judgment resolved questions of federal law," or "when the prior federal judgment sounded in federal law."⁷⁰ It does not, as far as

we can discern, purport to constrain *Moitie* removal to instances in which the *prior federal judgment* arose out of a case that a plaintiff himself had first brought in federal court. True, that is what happened in *Moitie* and that may prove to be the most common circumstance in which *Moitie* removal will occur. But *Moitie*'s sanctioning of removal, as we explained in *Carpenter*⁷¹ and as the Ninth Circuit has suggested,⁷² hinges on the *preclusive effects* of a *prior federal judgment* and a state court litigant's attempts to circumvent them artfully, *not* on the manner in which the case giving rise to the preclusive federal judgment reached federal court in the first place.

Indeed, we emphasize that the reasons Judge Garwood found in *Carpenter* that *Moitie* did not apply to the facts before his panel there were (1) there was no prior federal judgment to protect, (2) there was no federal preclusion law to apply, and (3) the plaintiff in *Carpenter*, unlike the plaintiffs in *Moitie*, was "taking preclusion risks in order to have her state law claim heard in its

⁶⁷ *Id.* at 149, 108 S.Ct. at 1691.

⁶⁸ Dissent, *infra*, at 2358 (emphasis added).

⁶⁹ 900 F.2d 1412 (9th Cir.1990).

⁷⁰ *Id.* at 1415-16 (emphasis added).

⁷¹ 44 F.3d at 370 ("If there was any federal character at all to the plaintiffs' state law claims in *Moitie*, it must be the federal law of preclusion.")

⁷² In *Ultramar*, the Ninth Circuit observed that:

The *Moitie* doctrine seems based on a court divining a litigant's motives for bringing suit. When a litigant suffered a final defeat on a federal claim yet thereafter files a similar-although-not-preempted state claim in state court, the sequence of events gives rise to an inference that the litigant is not interested in the state cause of action *per se*, but is instead attempting to circumvent the effects of the federal question judgment. In this limited instance, removal is allowed.

900 F.2d at 1417 (emphasis added).

preferred forum" and thus was "not attempting to avoid the effect of a prior judgment."⁷³ As we have strived to make clear in this opinion, however, in this case we do have a prior federal judgment, we do have federal preclusion law to apply, and we have plaintiffs who have not taken any preclusion risks, but, to the contrary, are clearly seeking by collateral attack to avoid the preclusive effect of a prior federal judgment, long since in repose, that concluded a case in which these plaintiffs had ample opportunity to assert their interests and in fact did assert them. It follows, then, that removal of the plaintiffs' state court collateral attack on the bankruptcy court's final judgment is entirely appropriate in this case, even though the preclusive – and thus essentially federal – nature of that federal court judgment derived from the underlying bankruptcy case. Here, the plaintiffs were interested creditors who were invited to assert their rights based on their second mortgage; there simply was no lawsuit initially filed by these plaintiffs in federal court. Therefore, in spite of Judge Jones' objections, we remain firmly convinced that the Mirannes are not entitled to have their faux foreclosure suit remanded to state court under the well-pleaded complaint doctrine. To do so would make a mockery of that doctrine; the very kind of untoward result that the artful pleading exception – like the fraudulent joinder doctrine – is designed to prevent.

⁷³ *Carpenter*, 44 F.3d at 371.

F. The Final Removal Twist – Supplemental Jurisdiction Over the Mirannes' Claims Against the Browns

To complete our analysis of the jurisdictional questions presented by this case, we address one final, relatively minor issue. The Mirannes insist that, even if the district court properly asserted removal jurisdiction as to Regions and FSA and properly denied remand as to those two defendants under the *Moitie/Carpenter* res judicata artful pleading exception, that court still could not exercise removal jurisdiction over the Mirannes' claims against the Browns. This is so, they urge, because the Browns were not parties to the 1986 bankruptcy proceedings that underlie the preclusion of the Mirannes' subsequent state court suit against FSA and Regions. We disagree. Although we do agree that the *Moitie/Carpenter* rationale is inapplicable to the Browns, the district court – having properly exercised *removal* jurisdiction as to the Mirannes' claims against Regions and FSA – could therefore exercise *supplemental* jurisdiction over the Mirannes' claims against the Browns. These claims clearly formed part of the "same case or controversy" as those against Regions and FSA.⁷⁴ Indeed, we have so found in a similar case involving the complete preemption branch of the artful pleading exception.⁷⁵

⁷⁴ See 28 U.S.C. § 1367.

⁷⁵ See *Kramer v. Smith Barney*, 80 F.3d 1080, 1086 & 1083 n. 1 (5th Cir. 1996) (observing that if plaintiff's state law fiduciary duty claims relating to ERISA governed pension accounts were removable under complete preemption theory, plaintiff's other related, non-ERISA, state law claims were removable as supplemental claims under § 1367).

Accordingly, we hold that the district court did not err in asserting jurisdiction over each defendant named in the Mirannes' state court complaint, including the Browns. Neither did that court err in refusing to remand any of those claims to state court.

G. Motions for Summary Judgment

In the foregoing analysis, we determined that the Mirannes' removed state court suit, "artfully" styled as an action to enforce the second mortgage, was in truth nothing but a transparent, "second bite" collateral attack on the bankruptcy court's 1986 orders. It was a blatant attempt at a "gotcha," grounded exclusively in the purely fortuitous and inadvertent failure of some person or persons unknown to follow-up on the court ordered cancellation of the second mortgage from the public records. As a result, we concluded that the well-pleaded complaint doctrine did not immunize that second suit from removal.

In like manner, we now hold that the district court properly granted summary judgment in favor of Regions and FSA on the basis of claim preclusion. Despite its intentionally deceitful garb, the core issue of the Mirannes' subsequent state court complaint was the efficacy of the final, executory, non-appealable orders of the bankruptcy court that had freed the leased premises from, *inter alia*, the Mirannes' second mortgage. As that issue was and remains *res judicata*, we affirm the district court's summary judgment in favor of Regions and FSA.

We also affirm the district court's grant of summary judgment in favor of the Browns albeit we do so on the

separate and independent ground that the Mirannes failed to establish any legal basis or triable issue of fact to support a claim against the Browns. As the district court observed, the Mirannes first acknowledged that the Browns did not participate in the prior bankruptcy proceedings, thereby casting doubt on whether the Browns could be held responsible for the Mirannes' loss of rights as a result of those proceedings. In addition, the Mirannes also characterized their action as one *in rem*, i.e., a claim to a right in the property, not one *in personam* against its *former* owners, thus precluding any personal liability on the Browns' part.⁷⁶ In sum, as the Browns had no contractual relationship at all with the Mirannes and had long since ceased to have any interest in the property which the Mirannes doggedly contend is still encumbered by their second mortgage, the Browns can have no personal liability to the Mirannes whatsoever. The district court properly granted the Browns' motion for summary judgment.

III

CONCLUSION

As should now be apparent from the foregoing analysis, we conclude that the district court correctly held

⁷⁶ See *Louisiana Nat. Bank of Baton Rouge v. O'Brien*, 439 So.2d 552, 556-58 (La.Ct.App. 1st Cir.1983), *writ denied*, 443 So.2d 590 (La.1983) (holding that note marked "in rem" gave maker no liability at all beyond property itself and that creditor was unable to maintain any action against maker to reach any of maker's other assets).

that the Mirannes are not entitled to have their previously removed state court suit remanded to state court under the well-pleaded complaint doctrine. The claim preclusion or res judicata branch of the artful pleading exception to that doctrine demonstrates beyond cavil that their state court suit, filed subsequent to the final judgments of the bankruptcy court on issues of federal law, need not be remanded. For essentially the same reasons, our de novo review of the district court's summary judgment dismissal of the Mirannes' claims against Regions and FSA satisfies us that the Mirannes' subsequent state court action, as removed to federal district court, is barred by res judicata. In like manner the court's exercise of supplemental jurisdiction over the claims against the Browns, and its dismissal of those claims, were not erroneous. Therefore, the district court's orders and judgment from which the Mirannes appeal are, in all respects,

AFFIRMED.

EDITH H. JONES, Circuit Judge, dissenting:

My brethren, conscientiously attempting to follow the guidance of *dicta* in a Fifth Circuit case¹ and a mystifying footnote by the Supreme Court,² have concluded that the federal district court possessed removal jurisdiction over a state court claim principally seeking foreclosure of a second mortgage. Were it not for the ambiguities in the two preceding cases, *Carpenter* and

¹ *Carpenter v. Wichita Falls Independent School Dist.*, 44 F.3d 362 (5th Cir.1995).

² *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981).

Moitie, this result would fly in the face of the well-pleaded complaint limit on removal jurisdiction. I respectfully dissent because I believe the majority's unusual result is not compelled by the authorities. Briefly, *Moitie* means less than the majority asserts, and the *Carpenter dicta* explaining *Moitie* do not require the result here reached. I fear that the majority's result further confuses an already complex byway of federal jurisdiction.

Without repeating the majority's analysis, I agree in part with their holding that – until the Supreme Court clarifies *Moitie* – *Moitie* is "better explained as permitting removal of only those subsequent state court claims that are barred by the res judicata effect of a prior federal judgment." Critically, I would add that the prior judgment should have involved a claim made under federal law. *Ultramar America Limited v. Dwelle*, 900 F.2d 1412, 1415 (9th Cir.1990).³ I would also emphasize that *Moitie* permitted removal only where the claim being removed represented a plaintiff's attempt to seek relief in state court by recharacterizing an "essentially federal" claim

³ The majority argues that the *Ultramar* decision does not "purport to constrain *Moitie* removal to instances in which the prior federal judgment arose out of a case that a plaintiff himself had first brought in federal court." Maj. Op. at 2355 (emphasis in original). However, *Ultramar* did involve a plaintiff who had asserted a prior claim, and the majority has cited no case where *Moitie* removal has been allowed where the plaintiff had not brought a prior suit grounded in federal law. The majority implicitly acknowledges that while it is not "constrain[ed]" from allowing *Moitie* removal where the plaintiff has not brought a prior claim, it is broadening the scope of *Moitie* removal beyond what has been allowed in other circuits.

that they had unsuccessfully pursued first in federal court. *Moitie* thus is a species of the artful pleading doctrine, a doctrine that permits a federal court to pierce the pleadings of a complaint which, although cloaked in terms of state law, actually falls within federal jurisdiction because of the applicability of federal principles. *Moitie*, 452 U.S. at 398, n. 2, 101 S.Ct. at 2427, n. 2. While the circuit courts have split in interpreting *Moitie*,⁴ this narrow understanding is accepted by the majority here and the Fifth Circuit and is well-grounded.⁵

⁴ Compare *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754 (2d Cir.1986) (using plaintiff's choice of forum analysis to apply *Moitie*) and *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368 (9th Cir.1987) (using res judicata analysis).

⁵ The Supreme Court's statement in *Moitie* that "at least some of the claims had a sufficient character to support removal" should be interpreted in light of the authority and examples cited in support of that proposition. 452 U.S. at 397, n. 2, 101 S.Ct. at 2427, n. 2. After citing Professor Wright's treatise for the proposition that federal courts may determine the "real nature" of a plaintiff's claim, the Court cited three cases in which courts did just that. Two were antitrust cases in which plaintiffs had pleaded antitrust claims under a South Carolina statute and the South Carolina courts had held that the statute only applied to conduct in *intrastate* commerce, while the defendants' challenged conduct actually involved *interstate* commerce. See *In re: Wiring Device Antitrust Litigation*, 498 F.Supp. 79, 82-83 (E.D.N.Y.1980) and *Three J Farms, Inc. v. Alton Box Board Company*, 1979 - 1 Trade Cases ¶ 62,423, 1978 WL 1459 (D.S.C.1978), *rev'd on other grounds*, 609 F.2d 112 (4th Cir.1979), *cert. denied*, 445 U.S. 911, 100 S.Ct. 1090, 63 L.Ed.2d 327 (1980). In the third case, the plaintiff filed only state conspiracy claims, but the district court held that the claims implicated federal antitrust laws and labor issues governed by the Labor Management Relations Act. See *Prospect Dairy, Inc. v. Dellwood Dairy Co.*, 237 F.Supp. 176, 178-79 (N.D.N.Y.1964).

But accepting this explanation of *Moitie*, that case cannot confer federal jurisdiction here, because the plaintiffs have no "essentially federal" claim to recharacterize. Their claim rests on purported rights under a second mortgage and on transfers of property interests that allegedly abrogated those rights. This is a state law claim. The only federal element that plaintiffs could have pleaded is an anticipatory defense based upon the prior bankruptcy proceeding. To fall within footnote 2 of *Moitie*, the subsequent state claim must be "merely the same . . . claim in disguise." *Salveson v. Western States Bankcard Ass'n.*, 731 F.2d 1423, 1427 (9th Cir.1984) (characterizing lower court's finding in *Moitie*). The plaintiffs here are not recharacterizing any federal claim. Instead, the second mortgage they seek to enforce was never expunged from the local deed records after a bankruptcy court judgment commanded sale free and clear of all liens and encumbrances. Moreover, the plaintiffs are suing a successor in interest to the bankruptcy sale, not simply the original party to the proceeding in bankruptcy court. Also unlike *Moitie*, the plaintiffs here were not unsuccessful plaintiffs in the prior bankruptcy proceeding, but were defendants there. In every respect, these characteristics represent a more complex procedural scenario than did the *Moitie* plaintiff's copycat pleadings in federal and then state court.

Given my druthers, I would hold that the instant case is distinguishable from a narrow reading of *Moitie*. If, however, *Moitie* compels the result reached by the majority, then it appears significantly to have intruded into previously well-settled removal jurisprudence, whose anchor is the well-pleaded complaint rule. Consider this

hypothetical: A sues B in federal court on a federal securities claim and wins a judgment. B then sues A in state court on a contract claim that was arguably a compulsory counterclaim in the preceding litigation. Following *Moitie* as interpreted by *Rivet*, does the federal court have removal jurisdiction? If so, hasn't *Rivet* moved the boundaries of removal jurisdiction far away from *Moitie*'s self-description as an "artful pleading" case?

The majority relies heavily on Judge Garwood's description of *Moitie* in the *Carpenter* decision. Notwithstanding *Carpenter*'s statement that "we hold that *Moitie* should apply only where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law," 44 F.3d at 370 (emphasis added), *Carpenter*'s statement is more *dicta* than holding. *Carpenter* was a very different case from *Moitie*. The defendants in *Carpenter* sought to rely on *Moitie* to prevent simultaneous litigation by a plaintiff in federal and state courts over the same grievance. Judge Garwood's extended, scholarly discussion of *Moitie* refused to adopt the proffered broad interpretation of *Moitie* that arguably would have prevented parallel litigation. As Judge Garwood put it, "whatever *Moitie* does mean, we are confident it does not mean so much." 44 F.3d at 368. The bulk of *Carpenter*'s discussion explains why some circuit court cases have incorrectly construed *Moitie* to govern parallel litigation.⁶ The *Carpenter* panel was not faced with anything like a plaintiff whose suit was in fact "completely precluded by a prior federal judgment on a question of

⁶ See 44 F.3d at 368-70, n. 6, n. 12 (disagreeing with the second circuit decision in *Travelers*, *supra*, n. 3)

federal law." This "holding" was merely a way to distinguish the cryptic *Moitie* footnote without "empty[ing] footnote 2 of all substantive content," and was surely not meant to broaden the *Moitie* decision's fleeting reference to the "federal character" of the plaintiff's claims into a completely new exception to the well-pleaded complaint rule. *See id.* at 370, n. 11.

In attempting to demonstrate that the factors relied upon by Judge Garwood in *Carpenter* to allow remand are not present here, the majority contends that "in this case we do have a prior federal judgment, we do have federal preclusion law to apply, and we have plaintiffs who have not taken any preclusion risks . . . but . . . are clearly seeking by collateral attack to avoid the preclusive effect of a prior federal judgment. . . ." Maj. Op. at 2355. I would hasten to add to that list what we also do not have in this case, but was essential in *Moitie* and obviously present in *Carpenter*: a conceivable federal claim that could be asserted by the plaintiff. The majority essentially holds that a *conceivable federal claim is not necessary for removal*, as long as there is a federal defense of res judicata based on a federal judgment. To say that a plaintiff's claim can be removed to federal court when he has alleged no conceivable federal claim is true mockery of the well-pleaded complaint rule and the artful pleading doctrine. How can the artful pleading doctrine apply if the plaintiff's claims can not be recharacterized into an essentially federal claim that has been omitted by artful pleading? *See Ultramar*, 900 F.2d at 1415 (" . . . recharacterization of purported state-law claims into federal claims was essential before removal could occur.").

Moreover, *Carpenter* expresses a fear of extending federal court removal jurisdiction that is realized in this case. Referring to the fact that plaintiff Carpenter could pursue litigation under theories of both federal and state constitutional law, Judge Garwood pithily observes, "we cannot say that the failure to make a state claim pendent makes it federal." *Id.* at 369. Here, whether we like it or not, and whether the plaintiffs proceeded in good faith or not, they have filed a claim that is based purely and solely on state law. It is not amenable to recharacterization as an "artful pleading" of a federal claim. In my view, *Carpenter* expressly decries the implication that this state-law claim must be removed to federal court according to a broad interpretation of *Moitie*.

Any reader who has followed the majority opinion and this dissent thus far ought to appreciate that our dispute, while technical, is not trivial.⁷ The principles of limited federal court jurisdiction and the relative clarity of jurisdictional rules are at issue. *Moitie* and *Carpenter* can be read to authorize removal of this state-law-based case simply because it is subject to a federal preclusion

⁷ The majority's holding has another unfortunate consequence. Allowing federal jurisdiction to turn on whether the plaintiff's claims are barred by res judicata allows the defendant two bites at the apple: if upon the plaintiff's motion to remand the defendant loses the res judicata issue and the case is remanded, the defendant can relitigate the res judicata issue again in state court. The prior federal determination of the res judicata issue will not bind the state court, because, by virtue of the federal court's resolution of the res judicata issue, the federal court was not a court of proper jurisdiction. See Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 HASTINGS L.J. 273, 311 (January 1993).

defense. But to do so, as I have shown, intrudes on the scope of the well-pleaded complaint rule, expanding federal removal jurisdiction while engendering complexity and uncertainty in the future. I do not believe such results were intended by the Supreme Court in *Moitie* or by the *Carpenter* panel; the best way to effectuate those decisions' narrowly tailored goals is to apply them narrowly and specifically. Because the majority opinion does not do so, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARY ANNA RIVET, MINNA REE CIVIL ACTION
WINER, EDMOND G. MIRANNE, AND
EDMOND G. MIRANNE, JR.
VERSUS
REGIONS BANK, WALTER L. BROWN,
JR., PERRY S. BROWN,
AND FOUNTAINBLEAU STORAGE
ASSOCIATES

NO. 95-0426

SECTION "A"

ORDER AND REASONS

This matter is before the Court on a Motion to Remand filed by plaintiffs Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne, and Edmond G. Miranne, Jr., and Motions for Summary Judgment filed by defendants Regions Bank, Walter L. Brown, Perry S. Brown, and Fountainbleau Storage Associates ("FSA"). Both motions were set for hearing on April 5, 1995, but were submitted on the briefs. For the reasons stated herein, plaintiffs' Motion to Remand is hereby DENIED and defendants' Motion for Summary Judgment is hereby GRANTED.

I. BACKGROUND

This suit concerns the vitality of a \$5,000,000 collateral mortgage note secured by a collateral mortgage on certain real property located on Tulane Avenue in New Orleans, Louisiana. In 1957, Lois Stern executed a lease on the property in favor of Pelican State Hotel Corporation. The leasehold estate created by the lease was

acquired by Tulane Hotel Investors Limited Partnership ("THILP") on September 15, 1983. On the same date, THILP granted a first mortgage on the leasehold estate to secure a \$15,000,000 collateral mortgage note pledged to First Financial Bank. On May 2, 1984, THILP granted a \$5,000,000 second collateral mortgage (the "Second Mortgage") on the leasehold estate.¹ This Second Mortgage forms the basis of the present dispute.

THILP filed for Chapter 11 bankruptcy on October 5, 1984. The bankruptcy was later converted to a Chapter 7 proceeding and a trustee appointed.² The trustee applied for court approval to sell the leasehold estate at public auction free and clear of all liens including, specifically, the Second Mortgage. The bankruptcy court issued an order advising all creditors and parties in interest of the sale and setting a hearing on any objections for June 16, 1986. At the hearing, plaintiff Edmond G. Miranne, Jr. appeared on behalf of himself and his father, Edmond G. Miranne, Sr., as holders of the Second Mortgage. Their wives, plaintiffs Minna Lee [sic] Winer and Mary Anna Rivet, did not appear. On June 17, 1986, the bankruptcy court granted the sale application and ordered that the

¹ For purposes of brevity, the Court will continue to refer to the "leasehold estate" as the prime subject of this dispute as it is uncontested that the plaintiffs' collateral mortgage burdened the leasehold estate. The Court's disposition of these motions moots defendants' alternate argument that plaintiffs' mortgage was extinguished by confusion, thereby removing any need to address plaintiffs' contention that the mortgage also attached to the buildings on the property as separate immovables.

² See *Matter of Tulane Hotel Investors Limited Partnership*, No. 84-02145-K, (Bankr.E.D.La. December 5, 1985).

sale be free and clear of all liens and encumbrances, including the Second Mortgage.

Pursuant to the bankruptcy court's June 17, 1986 order, the leasehold estate was sold at public auction to the first mortgage holder, First Financial Bank. On August 14, 1986, the bankruptcy court approved the auction results and issued an order directing sale of the property to First Financial Bank "free and clear of any and all liens and encumbrances" and specifically requiring cancellation of the Second Mortgage. Notwithstanding the terms of the bankruptcy court's order, the Second Mortgage was apparently never canceled and remains inscribed on the public records.

Secor Bank eventually succeeded First Financial Bank as owner of the leasehold estate. On December 29, 1993, defendants Walter S. Brown and Perry L. Brown sold the subject property to Secor, making Secor owner of both the property and the leasehold estate. On the same date Secor in turn conveyed its interest to FSA, the current owner.

Plaintiffs filed suit in state court alleging that the December 29, 1993 transactions violated their superior rights under the Second Mortgage. They sought payment of their secured debt and to have the Second Mortgage recognized and maintained against the property, or alternatively, damages. Defendants removed the suit to this Court, citing federal question jurisdiction in that the prior bankruptcy court orders extinguished the Second Mortgage. Plaintiffs filed a motion to remand, arguing that the prior bankruptcy court orders provide defendants with at most an affirmative defense insufficient to confer removal

jurisdiction. Defendants subsequently moved for summary judgment on grounds of *res judicata*, prescription, and confusion.

II. MOTION TO REMAND

The Fifth Circuit recently reiterated the principles governing federal question removal in *Carpenter v. Wichita Falls Independent School District*, 44 F.3d 362 (5th Cir. 1995). Generally, whether a cause of action presents a federal question for removal purposes depends upon the allegations of the plaintiff's well-pleaded complaint. *Id.* at 366. Accordingly, federal rights asserted by way of affirmative defense do not confer removal jurisdiction. However, the "artful pleading" doctrine, an exception to the "well-pleaded complaint" rule, provides that "where the plaintiff necessarily has available no legitimate or viable state cause of action, but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising exclusively under state law." *Id.* In other words, plaintiff cannot avoid removal of a suit necessarily federal in character. *Id.* at 367.

In *Carpenter*, the Fifth Circuit specifically addressed the artful pleading doctrine in the context of *res judicata*, holding that a defendant may properly remove a purported state law cause of action which is "completely precluded by a prior federal judgment on a question of federal law." The Court's explanation is controlling here:

[]Although we recognize that the state courts are able and required to apply federal rules of *res judicata*, the federal law preclusive effect of the federal judgment could arguably be said

to confer a federal character much the way complete preemption does. In both cases, federal law has in some sense extinguished the possibility of a state-court cause of action.

We also point out that the existence of a prior federal judgment lifts the statutory bar against enjoining an ongoing state proceeding. There is little practical distinction between, on the one hand, removing and dismissing a precluded state suit and, on the other hand, enjoining one. Under the relitigation exception to the Anti-Injunction Act, federal courts may enjoin state-court proceedings to protect prior federal judgments.

Id. at 370 (citations omitted and emphasis supplied). Thus under *Carpenter*, the propriety of removal in the present case hinges on whether the federal bankruptcy court's June 17, 1986 and August 14, 1986 orders preclude the plaintiffs' current attempt to enforce their mortgage.

Under the Fifth Circuit's formulation, *res judicata* bars a subsequent claim if: (1) the prior disposition was a final judgment on the merits rendered by a court of competent jurisdiction; (2) the parties are identical; and (3) the causes of action are the same. *Eubanks v. F.D.I.C.*, 977 F.2d 166, 169 (5th Cir. 1992); *Hendrick v. Avent*, 891 F.2d 583, 585 (5th Cir.), cert. denied, 498 U.S. 819 (1990). The present case satisfies all three elements of *res judicata*. It is undisputed that the bankruptcy court's August 14, 1986 Order approving the sale of the leasehold estate to First Financial constituted a final judgment rendered by a competent

court.³ As to the identity of parties element, the Court notes that First Financial Bank was a party to the bankruptcy proceedings. As successors-in-interest to First Financial Bank, Regions Bank and FSA are bound by the bankruptcy court's orders in the same manner as their predecessor. *Meza v. General Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir. 1990). Although plaintiffs Rivet and Winer did not personally appear in the bankruptcy proceedings, the Fifth Circuit has held that a husband's participation in a bankruptcy proceeding binds a wife whose interests are closely aligned with and adequately represented by her husband. *Eubanks v. F.D.I.C.*, 977 F.2d 166 (5th Cir. 1992). Plaintiffs do not even attempt to argue, and indeed it seems wholly implausible, that the Mirannes represented only their own interests at the bankruptcy hearing and not also their wives' interests in preserving and enforcing the Second Mortgage.

Finally, the identity of claims element is satisfied because plaintiffs' claims both in this action and in the bankruptcy proceeding turn on the validity of the Second Mortgage which was determined by the bankruptcy court. Plaintiffs' argument that their cause of action arises solely from the December 29, 1993 transactions ignores

³ Plaintiffs' opposition memorandum asserts at some length various procedural missteps committed by the bankruptcy court in disposing of the leasehold estate, however these arguments are irrelevant as the exclusive mechanism for attacking an improvidently granted bankruptcy order is a timely appeal or request for reconsideration. *Matter of Aguilar*, 861 F.2d 873, 874 (5th Cir. 1988) (citing *Matter of Colley*, 814 F.2d 1008, 1010 (5th Cir.), cert. denied, 484 U.S. 898 (1987).

the fact that all of plaintiffs' claims depend on the existence of a valid and enforceable mortgage. Absent an enforceable mortgage, the December 29, 1993 transactions would not contravene any of plaintiffs' rights and would not be actionable.

Because all three elements of *res judicata* are met, the prior federal bankruptcy court order completely precludes plaintiffs' present cause of action, making removal to federal court proper under *Carpenter*. Plaintiffs argue that any theory of removal jurisdiction based on claim preclusion is necessarily limited by the Supreme Court's decision in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S.Ct. 1684 (1988) to those situations where the specific claims sought to be precluded were "actually litigated" in the prior proceeding. Even assuming that plaintiffs are correct as to the significance of *Chick Kam Choo* in this context, the Court finds that the "actually litigated" requirement was satisfied here. As previously discussed, the central issue underlying plaintiffs' cause of action is the validity of their Second Mortgage as determined by the bankruptcy court. Plaintiffs' charge that defendants fail to put forward any issue that was "actually litigated" in the prior bankruptcy proceeding ignores the whole focus of defendants' various memoranda, namely, that the validity of plaintiffs' Second Mortgage was necessarily decided once and for all as a precursor to authorizing the sale of the leasehold estate free and clear of all liens.⁴

⁴ The Court moreover refuses plaintiffs' invitation to elevate semantics over substance by demanding that defendants employ the totemic words "issue preclusion" rather than the

Finally, plaintiffs' reliance on *D-1 Enterprises, Inc. v. Commercial State Bank*, 864 F.2d 36 (5th Cir. 1989) is misplaced. In *D-1 Enterprises*, the Fifth Circuit refused to apply *res judicata* against counterclaims which were largely unrelated to and which could not have been raised in an earlier summary bankruptcy proceeding. Here on the other hand, plaintiffs' objections to the sale free and clear of their Second Mortgage could have and should have been raised before the bankruptcy court in connection with the trustee's motion to sell. Once the bankruptcy court's orders became final and the property was ordered sold free and clear of plaintiffs' Second Mortgage, all claims relating to the validity of the Second Mortgage were *res judicata*. Removal is thus authorized because the bankruptcy court's orders "extinguished the possibility of a state-court cause of action" to enforce plaintiffs' Second Mortgage. See *Carpenter*, 44 F.3d at 370.

III. MOTIONS FOR SUMMARY JUDGMENT

The Court's holding that the prior federal bankruptcy orders completely preclude plaintiffs' suit to enforce their Second Mortgage necessitates dismissal of plaintiffs' claims against Regions Bank and FSA. The Court's holding also moots plaintiffs' request for further discovery pursuant to Federal Rule of Civil Procedure 56(f), as none of the facts anticipated to be discovered by plaintiffs would mandate an alternate result on the dispositive

traditional and still widely extant term "*res judicata*." See e.g., *U.S. v. Shanbaum*, 10 F.3d 305, 310-14 (5th Cir. 1994).

issue of preclusion. See Affidavit of John Gregory Odom Pursuant to Rule 56(f).

The final matter before the Court is the Motion for Summary Judgement filed by defendants Walter L. Brown, Jr. and Perry S. Brown. The basis of plaintiffs' claim is that the Browns "knowing[ly] participa[ted] in the series of transactions by which the Leasehold estate was cancelled [sic] and the separately owned buildings transferred in spite of the mortgage." See Memorandum in Opposition to Separate Motions for Summary Judgment at 14-15. However plaintiffs admit at page [sic]⁵ of their opposition memorandum that the Browns did *not* participate in the prior bankruptcy proceedings, and it is therefore difficult to see how the Browns can in any way be held responsible for plaintiffs' loss of rights pursuant to those proceedings. Moreover, plaintiffs themselves characterize their action as one *in rem*, which by definition is a claim against property, not against its former owners. The only case cited by plaintiffs in connection with their claim against the Browns, *In re Big Apple Scenic Studio, Inc.*, 63 B.R. 85 (Bkrtcy. S.D.N.Y. 1986), exhibits no relevance to the present case as it involved a Chapter 7 trustee's action to recover post-petition transfers. Finally, plaintiffs' nebulous allegation that "the Browns are proper parties herein because they are liable to plaintiffs under La. Civ. Code. art. 2315" fails to discharge plaintiffs' burden in opposing summary judgment. Plaintiffs have simply failed to establish any legal basis or any

⁵ See Memorandum in Opposition to Separate Motions for Summary Judgment at 9.

triable issue of fact to support a claim against the Browns. Accordingly,

IT IS ORDERED that plaintiffs' motion to remand is hereby DENIED;

IT IS FURTHER ORDERED that the motions for summary judgment filed by defendants Regions Bank, Walter L. Brown, Jr., Perry S. Brown, and FSA are hereby GRANTED.

The Clerk of Court is hereby directed to enter judgment dismissing this suit in accordance herewith.

New Orleans, Louisiana, this 20th day of April, 1995.

/s/ Charles Schwartz, Jr.
UNITED STATES
DISTRICT JUDGE

AUG 13 1997

CLERK

In The
Supreme Court of the United States

October Term, 1996

MARY ANNA RIVET, MINNA REE WINER, EDMOND
 G. MIRANNE and EDMOND G. MIRANNE, JR.,

versus

Petitioners,

REGIONS BANK OF LOUISIANA, WALTER L.
 BROWN, JR., PERRY S. BROWN and
 FOUNTAINBLEAU STORAGE ASSOCIATES,

Respondents.

**On Petition For Writ Of Certiorari
 To The Fifth Circuit Court Of Appeals**

**RESPONDENTS' BRIEF IN OPPOSITION
 TO PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Where a plaintiff files a state court action asserting a claim completely precluded by a prior federal court judgment on a matter of federal law, may the defendants properly remove the action to federal court pursuant to 28 U.S.C. § 1441(b)?

LIST OF RELATED PARTIES

In accordance with Supreme Court Rule 29.6, respondents state as follows:

1. Regions Bank of Louisiana, respondent herein, is a fully-owned subsidiary of Regions Financial Corporation.
2. Fountainbleau Storage Associates, respondent herein, is a Louisiana limited liability company whose principals and related parties and entities include the following:
 - (a) Bayou Plaza Development, L.L.C.
 - (b) Storage Trust REIT
 - (c) Michael D. Aufrecht
 - (d) Burnam Storage Associates
 - (e) The Burnam Companies
 - (f) Roland von Kurnatowski
 - (g) Chris Burnam
 - (i) Tim Burnam

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**RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

Respondents request that the Court deny the petition for writ of certiorari, which seeks review of a decision of the Fifth Circuit Court of Appeals. The Fifth Circuit's opinion is reported at 108 F.3d 576 (5th Cir. 1997) and is reprinted in the petition for certiorari at Appendix A.

STATEMENT OF THE CASE

I. Introduction

The petitioners filed a state court action seeking to foreclose on a mortgage nearly a decade after the entry of a bankruptcy court order, from which no appeal ever has been taken, authorizing the sale of certain property "free and clear" of the same mortgage. Although the petitioners were aware of the bankruptcy sale when the state suit was filed, they artfully drafted the state court petition, deliberately refraining from notifying the state court of either the bankruptcy proceeding or the federal court's order. In response to petitioners' effort to relitigate in state court a matter already tried to and the subject of a final order of the bankruptcy court, the defendants in the state court suit removed the matter to federal district court under the authority of *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed 2d 103 (1981). Both the district court and the court of appeals held that removal was proper under *Moitie* and that the suit should be dismissed under principles of claim preclusion in light of the bankruptcy court order. The petition for certiorari

followed petitioners' unsuccessful attempt to secure an *en banc* hearing from the Court of Appeals.

II. Statement of Facts

In 1957 Lois Stern leased to Pelican State Hotel Corp. a tract of property located in New Orleans, Louisiana. Pelican's interest in the lease ("Leasehold Estate")¹ was transferred on several occasions, finally being acquired by Tulane Hotel Investors Limited Partnership ("THILP") on September 15, 1983. On the same date THILP granted a mortgage ("First Mortgage") to secure a \$15,000,000 collateral mortgage note, which in turn had been pledged to secure a loan from First Financial Bank ("FFB").² Less than a year later, on May 2, 1984, THILP granted a second collateral mortgage ("Second Mortgage") on the Leasehold Estate to secure a \$5,000,000 collateral mortgage note³ held by the petitioners, Edmond G. Miranne,

¹ As the Fifth Circuit noted, the term "leasehold estate" is foreign to a civil law jurisdiction such as Louisiana. Pet. at App. 3, n. 2. Nonetheless, this common law terminology provides a convenient way to refer to the rights created under the 1957 lease.

² A collateral mortgage package is a Louisiana device using a mortgage and the pledge of a mortgage note to secure another note or a line of credit. Its origins can be found in the Louisiana Civil Code. *First Guaranty Bank v. Alford*, 366 So.2d 1299 (La. 1978).

³ A collateral mortgage note does not evidence the money that has been advanced by the lender; it is part of the security package. The Louisiana Supreme Court has held that the holder of a collateral mortgage note is not entitled to collect any funds from the borrower or from foreclosure on the mortgage unless there is money owing on the underlying debt. *First Guaranty*

Edmond G. Miranne, Jr., Mary Anna Rivet and Minna Ree Winer (collectively "the Mirannes").⁴ Edmond G. Miranne, Jr. was a partner of THILP at all relevant times.

THILP filed a petition for relief under Chapter 11 of the Bankruptcy Code on October 5, 1984. The THILP bankruptcy later was converted to a Chapter 7 proceeding, and a trustee was appointed. In the spring of 1986 the trustee applied for bankruptcy court authority to sell the Leasehold Estate free and clear of all liens, including the Second Mortgage. In response to the application, the bankruptcy court issued an order advising all creditors and parties in interest opposing the sale to serve objections on the trustee by June 12, 1986 and setting a hearing on the application for June 16, 1986.⁵ At the hearing, which was held as scheduled "after all creditors and parties in interest [had] been given the required notice [and] opportunity to object . . .," Edmond G. Miranne, Jr. appeared as attorney for himself and his father. App. B at 4a.⁶ A day later the bankruptcy court granted the sale

Bank v. Alford, 366 So.2d 1299 (La. 1978). See also Willenzik, "Future Advance Priority Rights of Louisiana Collateral Mortgages: Legislative Revisions, New Rules, and a Modern Alternative," 55 La. L. Rev. 1 (1994); Nathan and Marshall, "The Collateral Mortgage, Logic and Experience," 49 La. L. Rev. 39 (1988).

⁴ Mary Anna Rivet is married to Edward G. Miranne, and Minna Ree Winer is married to Edmond G. Miranne, Jr.

⁵ A copy of this order is attached as Appendix A.

⁶ A copy of the June 17, 1986 bankruptcy court order granting the trustee's sale application is attached as Appendix B.

application, stating expressly that the sale would be free and clear of the Second Mortgage. *Id.* at 4a, 9a.

Although the Mirannes argue now that the sale order was procedurally improper because it resulted from motion practice in the bankruptcy court, not from an adversary proceeding, Pet. 5, neither they nor any other interested party appealed from the sale order. On August 11, 1986, after expiration of the delays for appeal, the bankruptcy trustee held a public auction at which FFB, holder of the First Mortgage, submitted the only bid. The bankruptcy court approved the auction results and, by order dated August 14, 1986, directed that the sale proceed "free and clear of any and all liens and encumbrances" and that the Recorder of Mortgages for Orleans Parish "cancel and erase all liens, mortgages and encumbrances bearing against the said property . . .," including the Second Mortgage in favor of the Mirannes.⁷ App. C at 18a, 19a, 23a.

Secor Bank eventually succeeded FFB as owner of the Leasehold Estate. On December 28, 1993 it acquired the underlying property from Walter L. Brown, Jr. and Perry S. Brown ("the Browns"), successors-in-interest to the original lessor, thereby extinguishing the lease as a matter of law. La. Civ. Code Ann. art. 1903. Later that day Secor

conveyed the property in full ownership to Fountainbleau Storage Associates ("FSA"), its current owner. Secor since has been succeeded by Regions Bank of Louisiana ("Regions").

III. The Proceedings Below

A year after FSA acquired the property, the Mirannes brought suit in Louisiana state court against FSA, Regions and the Browns, alleging that the December 1993 transactions, by cancelling the lease and conveying the property, had prejudiced their rights under the Second Mortgage. The Mirannes made no reference in their state court pleadings to the 1986 bankruptcy court orders that, on their face, provided that the Second Mortgage ceased to encumber the property after August 14, 1986.⁸ Instead, treating the Second Mortgage as a currently valid encumbrance, they prayed for its recognition and enforcement against FSA's property or, alternatively, for damages.

The respondents removed the case to the United States District Court for the Eastern District of Louisiana pursuant to 28 U.S.C. § 1441(b), asserting that removal jurisdiction existed because of the claim preclusive effect of the bankruptcy court's orders. Following removal,

⁷ A copy of the bankruptcy court's August 14, 1986 order is attached as Appendix C. For reasons that are unclear, the Recorder of Mortgages never has canceled the Second Mortgage. His failure to do so is of no import under Louisiana law, since recordation of an unenforceable mortgage does not give it any legal effect. *Gibraltar Sav. F.A. v. First Mort. Corp.*, 825 F.Supp. 746, 749 (M.D. La. 1993); *First Nat. Bank of Ruston v. Mercer*, 448 So.2d 1369, 1376 (La. App. 2d Cir. 1984).

⁸ In their petition the Mirannes assert, summarily and without citation to authority, that the bankruptcy court orders lapsed in 1996. Pet. 5, 9. Money judgments in Louisiana lapse after 10 years unless revived, but respondents are aware of no comparable provisions that might have a similar effect upon the bankruptcy court's orders, which are executory in nature. See La. Civ. Code Ann. art. 3501.

respondents sought summary judgment on the basis of, *inter alia*, claim preclusion, while the Mirannes moved that the case be remanded to state court for lack of subject matter jurisdiction. Relying primarily upon *Carpenter v. Wichita Falls Independent School Dist.*, 44 F.3d 362 (5th Cir. 1995), the district court denied the motion to remand, granted summary judgment in favor of FSA and Regions on the basis of claim preclusion, and granted summary judgment against the Browns on other grounds. Pet., App. B.

The Fifth Circuit affirmed. After reviewing briefly the doctrine of artful pleading, the court of appeals held that this Court's decision in *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), authorized removal on federal question grounds "where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law." Pet., App. 17 (quoting from *Carpenter*, 44 F.3d at 370). It then determined that the 1986 orders of the bankruptcy court precluded the Mirannes' lawsuit, which it characterized as a "transparent, 'second bite' collateral attack" on those orders, justifying both removal of the case and summary judgment dismissing it.⁹ The Fifth

Circuit rejected the Mirannes' request for *en banc* consideration. 114 F.3d 1185 (5th Cir. 1997). Their petition for writ of certiorari followed.

REASONS TO DENY THE WRIT

I. The Court Has No Reason to Revisit the *Moitie* Footnote, Which Has Been the Subject of Relatively Little Circuit Court Jurisprudence and Which Has Generated No Significant Circuit Conflict

Both the district court and Fifth Circuit upheld removal jurisdiction in the instant case based upon footnote 2 of *Moitie*, which the court of appeals interpreted as authorizing removal on artful pleading grounds when a plaintiff files a state court action already barred by a federal judgment on a question of federal law. Pet., App. 17. The Mirannes' petition requests that the Court grant certiorari "to re-address the *Moitie* footnote . . ." Pet. 23. Although the arguments that it presents in support of that request are diffuse at best, the Mirannes appear to rely primarily upon a perceived inconsistency between the specialized artful pleading rule established by *Moitie* in the claim preclusion context and three subsequent decisions explicating the law of removal jurisdiction in other legal and factual contexts, *Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed. 2d 420 (1983), *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987), and *Oklahoma Tax Comm. v. Graham*, 489 U.S. 838, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989).

⁹ Although it found *res judicata* inapplicable to the claims against the Browns, the Fifth Circuit held that it could exercise supplemental jurisdiction over those claims under 28 U.S.C. § 1337. It then affirmed the grant of summary judgment in favor of the Browns because of the Mirannes' failure to establish any legal basis or triable issue of fact to support a claim against them. Pet., App. 33-35.

The circuit courts have perceived no such inconsistency and have had relatively little difficulty interpreting *Moitie* in the small number of cases affected by the jurisdictional rule of that case. Moreover, the circuit court decisions in those cases are not in substantial conflict. Thus, the instant case presents no compelling reasons for review and, more particularly, implicates none of the considerations governing review on certiorari expressly listed in Supreme Court Rule 10.

While urging this Court to re-address *Moitie*, the petitioners never address its facts or holding, preferring instead a critique with no context. Viewed in context, *Moitie* is not the aberration petitioners posit, but a narrow extension of the artful pleading doctrine designed to prevent sequential litigation dressed in "intentionally deceitful garb," in the Fifth Circuit's phrase. Pet., App. 34. To demonstrate how this is so, a brief review of *Moitie*'s facts and holding are necessary.

Moitie, like the instant case, involved an attempt by an unsuccessful litigant in federal court to refile his case in state court using pleadings containing no reference to the adverse federal judgment. Seven plaintiffs filed and lost an antitrust suit in federal court. Five of the seven appealed and ultimately were successful in that effort because of a new decision by this Court that worked a substantial change in the applicable law. The other two, *Moitie* and *Brown*, chose instead to refile their cases in state court, ostensibly pleading only state causes of action. Defendants removed the new cases to federal district court, which denied the motions to remand filed by *Moitie* and *Brown* upon finding that their state court complaints raised "essentially federal law claims" that

had been artfully recast as state law claims. 452 U.S. at 396-97, 101 S.Ct. at 2427. The district court then dismissed the removed actions as *res judicata* in light of the judgment entered in the prior federal litigation. *Id.*

Moitie and *Brown* appealed to the Ninth Circuit, which affirmed the district court's assertion of removal jurisdiction, but reversed on the merits of the *res judicata* determination. This Court granted certiorari "to consider the validity of the Court of Appeals' novel exception to the doctrine of *res judicata*," 452 U.S. at 398, 101 S.Ct. at 2427, ultimately finding the exception to be invalid. To reach that issue, however, the Court first had to determine its jurisdiction to do so, which it did in a footnote.

The Court of Appeals also affirmed the District Court's conclusion that *Brown* II was properly removed to federal court, reasoning that the claims presented were "federal in nature." We agree that at least some of the claims had a sufficiently federal character to support removal. As one treatise puts it, courts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." 14 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 3722, pp. 564-566 (1976) (citing cases) (footnote omitted). The District Court applied that settled principle to the facts of this case. After "an extensive review and analysis of the origins and substance of" the two *Brown* complaints, it found, and the

Court of Appeals expressly agreed, that respondents had attempted to avoid removal jurisdiction by "artful[ly]" casting their "essentially federal law claims" as state law claims. We will not question here that factual finding.

452 U.S. at 396-97 n. 2, 101 S.Ct. at 2427 n. 2.

Because the footnote addresses such a narrow jurisdictional issue, the circuit courts have had relatively few occasions to consider its import. The decisions that are extant reflect two somewhat different approaches to interpretation of the *Moitie* footnote, with one approach ultimately becoming generally accepted. The Second Circuit, in a relatively early decision, *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 760-61 (2d Cir.), cert. denied, 479 U.S. 885, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986), formulated what has been termed an "election of remedies" approach. Under this approach, if plaintiff files a complaint based on federal law in federal court and subsequently files another action in state court, purportedly based only on state law, but with virtually identical elements to the federal claims, he renders the second suit removable because he already has chosen, by his first suit, to pursue his federal claims. The Ninth Circuit, concerned that *Sarkisian's* rationale was overbroad, viewed the *Moitie* footnote more narrowly, reasoning, in light of the facts of *Moitie*, that the Court had intended to permit removal only of state court claims barred by the *res judicata* effect of a prior federal judgment. *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368, 1374-75 (9th Cir.), cert. denied, 484 U.S. 850, 108 S.Ct. 150, 98 L.Ed.2d 106 (1987).

Sullivan has been followed in a series of Ninth Circuit decisions. See, e.g., *Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 908 F.2d 477, 480 (9th Cir. 1990); *Ultramar America Ltd. v. Dwelle*, 900 F.2d 1412, 1415 (9th Cir. 1990) (limiting *Sullivan* to situations in which prior federal judgment resolved issues of federal law); *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1403 (9th Cir. 1988). Both the Sixth and Seventh Circuits likewise have found *Moitie* to support removal in the *res judicata* context. See *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911-12 (7th Cir. 1993); *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 342 (6th Cir. 1989). More recently the Fifth Circuit adopted the rationale of *Sullivan* in *Carpenter v. Wichita Falls Independent School Dist.*, 44 F.3d 362, 369 n. 6 (5th Cir. 1995), holding "that *Moitie* should apply only where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a matter of federal law." *Id.* at 370.

In light of this emerging circuit court consensus on the import of *Moitie*, less than unanimous only because of the Second Circuit's *Sarkisian* opinion, the Fifth Circuit's decision in the instant case was entirely predictable. Even Judge Jones, who dissented below, agreed with the majority's "well grounded" understanding of *Moitie*, although she disagreed with its application to the particular facts before her. Pet., App. 38-39. That disagreement over the proper application of *Moitie* does not warrant review by this Court, for as Supreme Court Rule 10 states, "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

Moitie created a narrow addition to the artful pleading doctrine applicable when a federal judgment on a matter of federal law precludes a subsequent state court lawsuit. The circuit courts have had little difficulty interpreting *Moitie* in a consistent, rational manner such that it can coexist peacefully with the principles enunciated in *Franchise Tax Board*, *Caterpillar* and *Oklahoma Tax Commission*, none of which involved issues of claim preclusion. It hardly is a wise use of this Court's limited resources to review a doctrine that has affected few litigants and has generated little controversy in the lower courts.

II. The Determination of Subject Matter Jurisdiction Often Requires Consideration of the Merits

Petitioners posit that the Fifth Circuit's jurisdictional holding in the instant case creates a logical conundrum by requiring a federal court to review an aspect of the merits of a removed case, namely whether it is barred by *res judicata*, to determine if it has subject matter jurisdiction in the first place. Pet. at 18-20. In creating this straw man, petitioners wrongly suggest that jurisdictional determinations in all other types of cases can be separated clearly from consideration of the merits.

This Court's jurisprudence is replete with counterexamples. Perhaps the most analogous of those counterexamples comes from two of the very cases that petitioners assert to be in conflict with the decision below, *Franchise Tax Board* and *Caterpillar*. In *Franchise Tax Board* the Court considered removal jurisdiction in the context of state law claims that defendant argued had been preempted by ERISA. Citing *Avco Corp. v. Aero Lodge No. 735, Intern.*

Assn. of Machinists and Aerospace Workers, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968), the Court held "that if a federal cause of action completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Board*, 463 U.S. at 24, 103 S.Ct. at 2854. In ruling that the case before it did not arise under ERISA and hence had been removed improvidently, the Court has to consider one important aspect of the case's merits – whether ERISA preempted the state law claims found in the complaint – an issue it ultimately decided favorably to the plaintiff. *Id.*, 463 U.S. at 24-27, 103 S.Ct. at 2854-55. Indeed, in any case involving the "complete preemption corollary to the well pleaded complaint rule," *Caterpillar*, 482 U.S. at 393, 107 S.Ct. at 2430, the court must decide a merits issue, federal preemption of plaintiff's state law claims, to determine its jurisdiction. See, e.g., *id.*, 482 U.S. at 394-96, 107 S.Ct. at 2430-31; *Avco*, 390 U.S. at 559-60, 88 S.Ct. at 1235 (determining first that plaintiff's state law claims were preempted and concluding from this that the district court had jurisdiction over the case); *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992) (court had to conclude that allegations of complaint fell under ERISA to determine propriety of removal.)

Similar examples abound outside the context of the artful pleading doctrine. Where a removing defendant alleges that the plaintiff has fraudulently joined a non-diverse defendant to prevent removal, a federal court can look beyond the complaint to the merits of the claim against that defendant to determine whether jurisdiction exists.

If . . . a non-resident defendant is joined, the joinder, although fair upon its face, may be shown by a petition for removal to be only a sham or fraudulent device to prevent removal; but the showing must consist of a statement of facts rightly leading to that conclusion apart from the pleader's deductions.

Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97, 42 S.Ct. 35, 37, 66 L.Ed. 144 (1921); *see also Sid Richardson Carbon & Gasoline Co. v. Interenergy Resources, Ltd.*, 99 F.3d 746, 751 (5th Cir. 1996) (court should employ a summary judgment-like procedure to resolve fraudulent joinder contentions); *Faucett v. Ingersoll-Rand Min. & Machinery Co.*, 960 F.2d 653, 654-55 (7th Cir. 1992) (fraudulent joinder established by affidavit absolving non-diverse defendant of liability). Courts likewise must consider the merits of a plaintiff's complaint to determine whether the amount in controversy meets jurisdictional requirements. E.g., *Gibbs v. Buck*, 307 U.S. 66, 72, 59 S.Ct. 725, 729, 83 L.Ed. 1111 (1939) ("If there were any doubt of the good faith of the allegations [of amount in controversy], the court might have called for their justification by evidence"); *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 184, 56 S.Ct. 780, 783, 80 L.Ed. 1135 (1936). Subject matter jurisdiction and merits issues also can overlap substantially in cases involving sovereign immunity, *Land v. Dollar*, 330 U.S. 731, 739, 67 S.Ct. 1009, 1013, 91 L.Ed. 1209 (1947) ("the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits"), and the "in commerce" jurisdictional requirement of the antitrust laws. *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 201 n. 19, 95 S.Ct. 392, 402 n. 19, 42 L.Ed.2d 378 (1974) (noting identity of jurisdictional issues

and certain issues on the merits); *Thornhill Pub. Co., Inc. v. General Tel. & Electronics Corp.*, 594 F.2d 730, 733-34 (9th Cir. 1979) ("if the attack on jurisdiction requires the court to consider the merits of the case, the court has jurisdiction to proceed to a decision on the merits").

Moitie's narrow and limited scope requires far less intrusive "merits" review than is mandated when, for example, a claim of fraudulent joinder is raised in a diversity action. In the latter, evidence in the form of affidavits (dealing with the fraudulently joined party's job, scope of responsibility, or activities) often must be presented to the court to be considered in ruling on the issue; in *Moitie*, as here, the only "evidence" to be considered are prior court orders and pleadings. The Fifth Circuit's opinion is not, as the petitioners claim, an aberration; rather, it is merely the latest in a long line of similar decisions, many of them from this Court, recognizing that in certain limited circumstances jurisdiction and "merits" issues are intertwined and must be considered together. The fact that a mixed question of jurisdiction and merits occurs in this limited context should not constitute a basis for this Court to exercise its discretionary jurisdiction.

III. The Decision of the Fifth Circuit Does Not Alter the Balance Between the Federal and State Judicial Systems

Removal of a state court action precluded by a prior federal judgment is not the only means by which a defendant can avoid relitigation of the precluded claims. Under the relitigation exception to the Anti-Injunction Act, the

federal courts may enjoin state court proceedings to protect prior federal judgments. 28 U.S.C. § 2283. For that reason the *Moitie* doctrine, as explicated by the circuit courts, does not alter the existing balance between the federal and state judicial systems.

There is little practical distinction between, on the one hand, removing and dismissing a precluded state court suit and, on the other hand, enjoining one . . . Instead of removing, the defendants in *Moitie* might . . . have requested an injunction from the federal court. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986). If issued, an injunction would have had the same effect as removal: the end of state-court proceedings. Because the relitigation exception to the Anti-Injunction Act has already realigned federal-state relations in favor of the federal courts in such an instance, any potential impact on federalism from removal was not significant.

Carpenter, 44 F.3d at 370.

To be sure, there are some differences between *Moitie* removal and the relitigation exception to the Anti-Injunction Act. For one, an injunction can be issued only if the claims in the state proceedings actually were decided by the federal court. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148, 108 S.Ct. 1684, 1690-91, 100 L.Ed.2d 127 (1988). *Moitie* imports no such "actually litigated" standard into the law of removal jurisdiction. Pet., App. 28. In addition, a federal court is not required to enjoin a precluded state court proceeding, but merely has the discretion to do so. *Id.*, 486 U.S. at 151, 108 S.Ct. at 1692. The federal court cannot refuse to entertain a removed case properly before it under *Moitie*.

These distinctions, however, are of no moment in the instant case. In responding to one of petitioners' arguments concerning the propriety of removal, both the district court and the Fifth Circuit found that the issues raised in petitioners' state court pleadings already had been litigated before the bankruptcy court and decided adversely to them, satisfying the *Chick Kam Choo* prerequisite for issuance of an injunction. Pet., App. 27-30, 50. Moreover, there can be little doubt from the tenor of the Fifth Circuit's opinion that had the respondents requested an injunction under 28 U.S.C. § 2283, the lower court would have exercised its discretion to grant one. Pet., App. 34 (characterizing state court complaint as a "blatant attempt at a 'gotcha'" and criticizing its "intentionally deceitful garb"). Thus, the removal of petitioners' state court action accomplished nothing beyond what the relitigation exception to the Anti-Injunction Act authorizes.

In light of the availability of injunctive relief in most instances of *Moitie* removal, including this one, petitioners' assertion that the Fifth Circuit's decision "removes virtually any limitation to the naked assertion of federal power over a state court" is best viewed as the hyperbole of a litigant desperate to salvage a precluded claim that never should have been brought. Even should the Court believe that it needs someday to revisit the *Moitie* footnote, which seems unnecessary giving the growing circuit court consensus on its import, this case is not the proper vehicle to do so. Petitioners' substantive claim, that they should be allowed to foreclose on a mortgage that the bankruptcy court ordered removed a decade earlier, is frivolous. This Court ought not squander its resources to review a jurisdictional issue that is without practical significance.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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**Counsel of Record*

IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE EASTERN DISTRICT OF LOUISIANA
 IN THE MATTER OF: NO. 84-02145-K
 TULANE HOTEL INVESTORS
 LIMITED PARTNERSHIP CHAPTER 7
 DEBTOR (Filed
 August 15, 1986)

ORDER

Considering the foregoing application by the Trustee for approval of employment of auctioneer, approval of sale by public auction, free and clear of any and all interests, claims, liens, mortgages and encumbrances, and approval of letter agreement by and between the Trustee and First Financial Bank, F.S.B., it is:

HEREBY ORDERED BY THIS HONORABLE COURT that creditors and parties in interest of this estate are given until the 12 day of June, 1986, to service any objection to the sale on the Trustee, and to file such objection with the Clerk of the U. S. Bankruptcy Court, 500 Camp Street, New Orleans, Louisiana.

FURTHER ORDERED BY THIS HONORABLE COURT that if objections are received, a hearing will be held before the undersigned bankruptcy judge on the 16th day of June, 1986, at 9:00 o'clock A.m., in Room 1-104, U. S. Bankruptcy Court, 500 Camp Street, New Orleans, Louisiana.

FURTHER ORDERED BY THIS HONORABLE COURT that if no objections are received this Honorable

Court hereby authorizes the employment of Marvin Kessler of Lemarco and Associates as auctioneer at a fee of \$3,000.00, plus the reimbursement of expenses not to exceed \$5,000.00; that this Honorable Court authorizes the sale by public auction as set forth in said application, on the 31 day of July, 1986, at 10:30 o'clock A.m., at 4040 Tulane Ave, free and clear of any and all interests, claims, liens, mortgages and encumbrances, and approves the letter agreement by and between the Trustee and First Financial Bank, F.S.B.

New Orleans, Louisiana, this 18th day of April, 1986.

/s/ T. H. Kingsmill
T. H. KINGSMILL, JR.
U. S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: CASE NO. 84-02145K
TULANE HOTEL INVESTORS CHAPTER 11
LIMITED PARTNERSHIP CONVERTED TO
DEBTOR CHAPTER 7
(Filed Jun. 19, 1986)

ORDER AUTHORIZING EMPLOYMENT
OF AUCTIONEER AND SALE BY PUBLIC AUCTION
OF PROPERTY FREE AND CLEAR OF ANY
AND ALL INTERESTS, CLAIMS, LIENS,
MORTGAGES AND ENCUMBRANCES

On the 16th day of June, 1986, came on for hearing the Trustee's Application For Approval Of Employment Of Auctioneer And For Approval Of Sale By Public Auction, Free And Clear Of Any And All Interests, Claims, Liens, Mortgages And Encumbrances.

APPEARANCES:

Emile L. Turner, Jr. - attorney for Jean Hebert Turner, Trustee (hereinafter "the Trustee")

J. Michael Dendy - Attorney for Walter Brown

Edmond G. Miranne, Jr. - Attorney for Edmond. G. Miranne, Jr. and Edmond G. Miranne, Sr.

Lee C. Grevemberg - Attorney for Tulane Hotel Investors Corporation, Tulane Hotel Investors

Limited Partnership,
Barry Trinchart, and Nor-
man Parent

Alwynn J. Cronvich - Attorney for McCann
Electronics

It appearing that all creditors and parties in interest have been given the required notice, opportunity to object and be heard; further that this Court has determined that the sale is in the best interest of the estate and the public auction represents the best method of obtaining the best possible price under the circumstances of the property being sold, therefore:

IT IS HEREBY ORDERED that:

- 1) The Trustee is authorized to sell at public auction the property known as the Bayou Plaza Hotel, as more particularly described in Exhibits "A" and "B" attached hereto, less and except the property described in Exhibit "C" attached hereto;
- 2) The sale will be free and clear of any and all interests, claims, liens, mortgages and encumbrances including without limitation those items detailed on Exhibit "D" attached hereto (with exception made for those certain chattel mortgages as shown on Exhibit "C");
- 3) The Trustee is authorized to employ Marvin Kessler of Lemarco and Associates as auctioneer at the public auction sale, said auctioneer to receive \$3,000.00 as compensation for services rendered plus the reimbursement of expenses not to exceed \$5,000.00, which amounts shall be paid by the Bank after completion of the public auction sale;

- 4) The terms of the sale by public auction shall be
 - (a) minimum opening bid of \$5,250,000.00, which sum equals seventy-five (75%) percent of the appraised value of the property as found by the Court in its Judgment signed June 9, 1986; (b) the minimum opening bid shall be guaranteed by the Bank upon the terms and conditions as set forth in the letter agreement as shown in Exhibit "E" attached hereto, which terms and conditions are approved by the Court; (c) the Bank's minimum bid may be as a credit against the secured indebtedness in favor of the Bank; and (d) all bids other than that of the Bank shall be cash payable by ten (10%) percent non-refundable deposit at time of auction and balance payable not later than thirty (30) days from auction date.
- 5) In the event that the minimum bid by the Bank is exceeded, then the Trustee is authorized to distribute the sale proceeds first retaining the net amount of \$150,000.00 for the estate; secondly, the balance of the proceeds shall be paid to the Bank in whole or partial payment of its secured claim;
- 6) Upon completion of the sale to the successful bidder, and receipt of the purchase price, Trustee is authorized and directed to execute and deliver a deed conveying unto the successful bidder the property as outlined in Paragraphs (1) and (2) *supra* and any and all other documents necessary to comply with the terms and conditions of the letter agreement attached as Exhibit "E";
- 7) Upon certification by the Trustee that the sale by public auction and conveyance to the successful bidder is complete, the Recorder of Mortgages for the Parish of Orleans, State of Louisiana, is hereby authorized and directed to cancel and

erase from the public records of his office all liens, mortgages and encumbrances, but only insofar as they may affect the property described in Exhibits "A" and "B" attached hereto, including without limitation, those liens, mortgages and encumbrances as shown on Exhibit "D" attached hereto except for those certain chattel mortgages as shown on Exhibit "C" attached hereto.

SO ORDERED, this 17th day of June, 1986, at New Orleans, Louisiana.

/s/ T.H. Kingsmill, Jr.
U. S. BANKRUPTCY JUDGE

EXHIBIT D

- 1) State of Louisiana, Dept. of Employment Security Tax Assessment & Liens Acct. #085164, Fountainbleau Hotel, a Louisiana corp., due \$43,734.82, dated August 8, 1974, filed September 10, 1974 (NA 139736), recorded at MOB 2255, Folio 28;
- 2) Supplemental Chattel Mortgage in favor of Central States Southeast & Southwest Areas Pension Fund by Fountainbleau-Orleans in the principal amount of \$_____, recorded at MOB 2369, Folio 314 on May 4, 1981;
- 3) Tax Lien against Fountainbleau-Orleans in favor of the State of Louisiana in the principal amount of \$15,678.28, recorded at MOB 2361, Folio 762 on December 22, 1981;

- 4) Collateral Chattel Mortgage in favor of First Financial Bank by Tulane Hotel Investors Limited Partnership in the principal amount of \$10,000,000.00, recorded at MOB 2425, Folio 500 on September 19, 1983;
- 5) Collateral Mortgage in favor of First Financial Bank by Tulane Hotel Investors Limited Partnership in the principal amount of \$15,000,000.00, recorded at MOB 2426, Folio 674 on September 19, 1983;
- 6) Affidavit for No Work or Materials, recorded at MOB 2430, Folio 313 on September 19, 1983;
- 7) Contract Sum in the principal amount of \$40,000.00, Agreement August 29, 1983, recorded at MOB 2430, Folio 425 on October 4, 1983;
- 8) Contract Sum in the principal amount of \$1,453,261.00, Agreement September 2, 1983, recorded at MOB 2430, Folio 428 on October 4, 1983;
- 9) Contract Sum in the principal amount of \$20,000.00, Agreement August 29, 1983, recorded at MOB 2430, Folio 438 on October 4, 1983;
- 10) Chattel Mortgage in favor of United Machinery Corporation by Tulane Hotel Investors Limited Partnership, in the principal amount of \$27,012.00, recorded at MOB 2438, Folio 365 on January 24, 1984;
- 11) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of \$77,792.00, recorded at MOB 2438, Folio 550 on February 13, 1984;
- 12) Lien in favor of Gerald Seale in the principal amount of \$1,365.00, recorded at MOB 2433, Folio 778 on April 13, 1984;
- 13) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership,

- in the principal amount of \$16,280.78, recorded at MOB 2456, Folio 43 on May 7, 1984;
- 14) Lien in favor of Southland Plumbing Supply, Inc., in the principal amount of \$2,141.08, recorded at MOB 2470, Folio 301 on May 10, 1984;
 - 15) Acceptance of Unrecorded Contract May 7, 1984, recorded at MOB 2452, Folio 309 on May 18, 1984;
 - 16) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of \$12,513.60, recorded at MOB 2459, Folio 12 on May 21, 1984;
 - 17) Lien in favor of T.N.T. Drywall Supplies, Inc., in the principal amount of \$3,801.91, recorded at MOB 2455, Folio 120 on June 1, 1984;
 - 18) Lien in favor of Pelican Plumbing Supply, Inc., in the principal amount of \$44,153.87, recorded at MOB 2455, Folio 168 on June 13, 1984;
 - 19) Lien in favor of American District Telegraph Co., in the principal amount of \$17,072.81, recorded at MOB 2455, Folio 179 on June 15, 1984;
 - 20) Lien in favor of American District Telegraph Co., in the principal amount of \$6,441.33, recorded at MOB 2463, Folio 173 on July 11, 1984;
 - 21) Lien in favor of Pool & Patio Center in the principal amount of \$7,275.29, recorded at MOB 2463, Folio 261 on July 16, 1984;
 - 22) Lien in favor of Paddison Construction Co., in the principal amount of \$135,000.00, recorded at MOB 2463, Folio 270 on July 17, 1984;
 - 23) Lien in favor of Commercial Painting Co., Inc., in the principal amount of \$8,655.38, recorded at MOB 2463, Folio 480 on July 30, 1984;

- 24) Lien in favor of Express Electric Co., Inc., in the principal amount of \$26,936.91, recorded at MOB 2463, Folio 498 on August 3, 1984;
- 25) Lien in favor of W. F. Keller Co., Inc., in the principal amount of \$9,793.00, recorded at MOB 2463, Folio 532 on August 8, 1984;
- 26) Lien in favor of Help Service Co., Inc., in the principal amount of \$18,396.47, recorded at MOB 2463, Folio 548 on August 10, 1984;
- 27) Lien in favor of Reliable Disposal Co., Inc., in the principal amount of \$2,160.00, recorded at MOB 2463, Folio 564 on August 15, 1984;
- 28) Lien in favor of R. C. Flooring in the principal amount of \$10,479.16, recorded at MOB 2463, Folio 574 on August 16, 1984;
- 29) Collateral Mortgage in the principal amount of \$5,000,000.00, before J. F. Quaid, Notary Public, recorded at MOB 2469, Folio 3 on August 17, 1984;
- 30) Lien in favor of Boes Iron Works in the principal amount of \$2,475.00, recorded at MOB 2470, Folio 44, on September 5, 1984;
- 31) Affidavit of Lis Pendens in favor of American District Telegraph Co., in the principal amount of \$17,072.81, recorded at MOB 2464, Folio 507 on September 7, 1984;
- 32) Affidavit of Lis Pendens in favor of American District Telegraph Co., in the principal amount of \$6,441.33, recorded at MOB 2464, Folio 507 on September 7, 1984;
- 33) Lien in favor of Wholesale Electric Supply Co., in the principal amount of \$6,435.85 at MOB 2470, Folio 109 on September 13, 1984;

- 34) Lien in favor of Orleans Roofing & Materials in the principal amount of \$12,024.38, recorded at MOB 2470, Folio 148 on September 18, 1984;
- 35) Lien in favor of Montgomery Elevator Company in the principal amount of \$135,621.40, recorded at MOB 2470, Folio 155 on September 19, 1984;
- 36) Lien in favor of Edward Maurer International, Inc., in the principal amount of \$55,600.00, recorded at MOB 2470, Folio 192 on September 21, 1984;
- 37) Lien in favor of Delta C.T. Patterson Co., Inc., in the principal amount of \$1,942.07, recorded at MOB 2470, Folio 204 on September 21, 1984;
- 33) [sic] Lien in favor of Southland Plumbing Supply, Inc., in the principal amount of \$2,141.08, recorded at MOB 2470, Folio 301 on October 5, 1984;
- 39) Lien in favor of Krogh Electric Supply, Inc., in the principal amount of \$5,792.61, recorded at MOB 2470, Folio 339 on October 11, 1984;
- 40) Notice of Pendency of Action in favor of Pelican Plumbing Supply, CDC 84-16988, recorded at MOB 2473, Folio 99 on October 12, 1984;
- 41) Lien in favor of Bassil's Ace Hardware in the principal amount of \$2,928.46, recorded at MOB 2470, Folio 441 on November 2, 1984;
- 42) Lien in favor of Nofie D. Alfonso, Jr. & Associates in the principal amount of \$26,361.00, recorded at MOB 2470, Folio 447 on November 2, 1984;
- 43) Lien in favor of Foster Co., Inc., in the principal amount of \$7,317.36, recorded at MOB 2479, Folio 96 on November 16, 1984;
- 44) Lien in favor of Bernard Lumber Co., Inc., in the principal amount of \$6,177.89, recorded at MOB 2479, Folio 216 on December 14, 1984;

- 45) Lien in favor of Foster Co., Inc., in the principal amount of \$17,317.36, recorded at MOB 2479, Folio 325 on January 8, 1985;
- 46) Seizure and Sale in favor of First Financial Bank (FSB) in the principal amount of \$10,622,001.63, CDC 85-8279, May 16, 1985, recorded at MOB 2493, Folio 457 on May 16, 1985;
- 47) Federal Tax Lien against Tulane Hotel Investors Corporation in the principal amount of \$2,198.39, recorded at FTL 28, Folio 174 on February 24, 1986;
- 48) Edmond G. Miranne, Sr., guarantor of the loan by First Financial Bank to Tulane Hotel Investors Limited Partnership, and claimant in the following proceedings:
 - a) "First Financial Bank versus Virginia Copeland, wife of/and Edward F. Butler". Case Number 303-674 of the Docket of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana;
 - b) "First Financial Bank versus Wendy Early, wife of/and Norman A. Parent", Case Number 303-675 of the Docket of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana;
 - c) "First Financial Bank versus Barry Trinchart", Case Number 303-676 of the Docket of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana;
 - d) "Tulane Hotel Investors Corporation, et al vs. First Financial Bank, F.S.B. et al", Case Number 84-6127 of the Docket of the United States District Court for the Eastern District of Louisiana;
 - e) "Tulane Hotel Investors Limited Partnership, et al vs. First Financial Bank, F.S.B.", Case Number

- 85-7028 of the Civil District Court for the Parish of Orleans, State of Louisiana;
- f) "First Financial Bank, F.S.B. vs. Tulane Hotel Investors Limited Partnership", Case No. 85-8279 of the Docket of the Civil District Court for the Parish of Orleans, State of Louisiana;
- 49) Mary Anna Rivet/wife of Edmond G. Miranne, Sr., and claimant in proceedings enumerated in Section 50, *supra*;
- 50) Edmond G. Miranne, Jr., limited partner of Tulane Hotel Investors Limited Partnership, and claimant in proceedings enumerated in Section 50, *supra*;
- 51) Minna Ree Weiner/wife of Edmond G. Miranne, Jr., and claimant in proceedings enumerated in Section 50, *supra*;
- 52) Barry Trinchard, limited partner of Tulane Hotel Investors Limited Partnership, and claimant in proceedings enumerated in Section 50, *supra*;
- 53) Norman A. Parent, limited partner of Tulane Hotel Investors Limited Partnership, and claimant in proceedings enumerated in Section 50, *supra*;
- 54) Wendy Early/wife of Norman A. Parent, and claimant in proceedings enumerated in Section 50, *supra*;
- 55) Tulane Hotel Investors Corporation, corporate general partner of Tulane Hotel Investors Limited Partnership and claimant in proceedings enumerated in Section 50, *supra*;
- 56) Edward F. Butler, limited partner of Tulane Hotel Investors Limited Partnership, and claimant in proceedings enumerated in Section 50, *supra*;
- 57) Virginia Copeland/wife of and Edward F. Butler and claimant in proceedings enumerated in Section 50, *supra*;

- 58) Riverbank Mortgage Company, whatever interest may exist as a mortgage broker;
- 59) Sue Brignac, whatever interest she may have as a party in interest.
- 60) Notice of Lis Pendens by Edmond G. Miranne, Jr., in regard to the following proceedings:
- a) "Tulane Hotel Investors Limited Partnership, et al vs. First Financial Bank, FSB, et al, bearing docket number 84-6127 of the United States District Court for the Eastern District of Louisiana;
 - b) "Tulane Hotel Investors Limited Partnership, et al vs. First Financial Bank, FSB", bearing docket number 85-7028 of the Civil District Court for the Parish of Orleans, State of Louisiana;
 - c) "First Financial Bank, FSB vs. Tulane Hotel Investors Limited Partnership", bearing docket number 85-8279 of the Civil District Court for the Parish of Orleans, State of Louisiana;
 - d) "First Financial Bank, FSB vs. Virginia Copeland, wife of, and Edward F. Butler", bearing docket number 303-674 of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana;
 - e) "First Financial Bank, FSB vs. Wendy Early, wife of, and Norman A. Parent", bearing docket number 303-675 of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana;
 - f) "First Financial Bank, FSB vs. Barry Trinchard", bearing docket number 303-676 of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana.
-

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF: *
 TULANE HOTEL * NO. 84-02145-K
 INVESTORS LIMITED * IN BANKRUPTCY
 PARTNERSHIP *
 DEBTOR *

ORDER

Considering the foregoing Application of the Trustee herein, it is:

HEREBY ORDERED that the public auction sale held in the above captioned matter on Monday, August 11, 1986, at 2:00 p.m. in the Etouffe Dining Room, First Floor Bayou Plaza Hotel, 4040 Tulane Avenue, New Orleans, Louisiana, of the following:

A. All of the Debtor's Leasehold interest and estate, and all right, title, interest and privileges in and under that certain lease made and entered into by and between Mrs. Lois Stern, wife of Walter Brown (and the said Walter Brown by intervention), as lessor and Pelican State Hotels Corporation, as lessee, dated October 4, 1957 and duly registered in COB 622, folio 126 on November 5, 1957, as amended May 22, 1958 and duly registered in COB 621, folio 595 on June 6, 1958; all of the right, title and interest of Pelican State Hotels Corporation was acquired by H. R. Weissberg Corporation by Agreement of Merger dated December 19, 1961 and duly registered in COB 644, folio 287, on

March 20, 1962; and all of the right, title and interest of Pennsylvania Real Estate Investment Trust was acquired by act under private signature, dated April 23, 1965, and duly registered in COB 668B, folio 254 on April 26, 1965. Fontainebleau-Orleans acquired said interest by act before Louis G. Dutel, Jr., N.P., dated December 30, 1975, COB 738A, folio 406.

B. All of the interest of the estate in and to the buildings and improvements located and/or situated on the following described property bearing municipal number 4000 Tulane Avenue, City of New Orleans, State of Louisiana, together with all the rights, ways, privileges, servitudes and appurtenances thereunto belonging or in anywise appertaining, situated on the leasehold hereinabove described and consisting more particularly of the following described property:

THAT CERTAIN PORTION OF GROUND, together with all rights, ways, privileges, servitudes, appurtenances and advantages thereunto belonging or in anywise appertaining, situated in the First District of the City of New Orleans, designated as SQUARE NO. 763, bounded by Tulane and Carrollton Avenues and Gravier and South Pierce Streets, and according to a survey made by F. C. Gandolfo, Jr., Surveyor, dated July 7, 1937, a blue print copy of which is annexed to an Act before Robert Legier, Notary Public, on March 21, 1941, which survey was redated December 16, 1947, a blue print copy of which survey was annexed to an Act before Ernest Carrere, Jr., Notary Public, on December 22, 1947, said square measures 425 feet, 7 inches, 2 lines, actual, 424 feet, 2 inches, 6 lines, title, front on Carrollton Avenue, 425 feet, 9 inches,

no lines actual, 425 feet, 6 inches, 2 lines title, front on South Pierce Street, 604 feet, 3 inches, 5 lines actual, 602 feet, 11 inches, 2 lines title, front on Tulane Avenue, and 642 feet, 1 inch, 3 lines actual, 642 feet, 3 inches, no lines title, front on Gravier Street.

C. All of the estate's right, title and interest in and to that certain machinery, equipment, furniture, fixtures and/or all other property, of every nature and kind whatsoever, that has been placed in, upon or above the property hereinabove described for the service and operation of the buildings and improvements thereon or which is located thereon for the use of the Debtor, either directly or indirectly in such service or operation (less and except that property subject to the exception noted on Exhibit "B");

D. All of the estate's right, title and interest in and to those existing leases and/or subleases granted by Pelican State Hotels Corporation, H. R. Weissberg Corporation, "The Fontainebleau Motor Hotel", Pennsylvania Real Estate Investment Trust, Fontainebleau Hotel Corporation, and/or the Debtor as Lessor(s), to any present tenants, occupants, licensees, franchise and/or concession holders;

E. All of the Debtor's leasehold interest and estate, and all right, title, interest and privileges in and under that certain lease made and entered into by and between the City of New Orleans, Louisiana, as lessor, and Fontainebleau-Orleans, an Ordinary Partnership in Commendam, as lessee, said lease being authorized by ordinance Number 6134 dated September 30, 1976 and approved by the City Council on October 21, 1976, and the Mayor of the City

of New Orleans, Louisiana on October 22, 1976, and duly recorded in COB 743E, folio 118-124 of the conveyance records for the Parish of Orleans, on December 20, 1976.

Together with all buildings and improvements, appurtenances and attachments, rights, ways, privileges, servitudes, advantages, batture and batture rights, thereunto belonging or in anywise appertaining, including all immovables by nature or destination, and their component parts, now or hereafter forming part of and attached to or connected with said property or used in connection therewith.

F. All corporeal movables owned by the Debtor that are now and from time to time shall be located upon the above described premises for use in the conduct and/or operation of the hereinabove business and commercial activity, namely the hotel/motel now known as the Bayou Plaza Hotel including without limitation all equipment, furniture, television sets (less and except the television sets described in Section C hereof), fixtures of every kind and description, without exception that are now or may come upon the premises; and

G. All right, title and interest in and to that certain mass or assemblage of food and restaurant supplies, including canned and frozen foods, beer, wine and other alcohol beverages and soft drinks, constituting the entire stock of supplies and inventory of the Debtor now located and to be located at its place of business known as the Bayou Plaza Hotel located at 4040 Tulane Avenue, New Orleans, Louisiana 70119.

H. Less and except (a) certain television equipment; (b) certain private cable equipment leased

from McCann Electronics; (c) certain equipment leased from First Continental Leasing Corporation; (d) certain laundry equipment; (e) certain refrigeration equipment.

1. Equipment for private cable system owned and leased by Malcolm G. McCann, Jr., McCann Electronics, as described in the inventory.
2. Equipment owned and leased by First Continental Leasing Corporation as described in the three leases.
3. Television equipment and accessories subject to the vendor's lien of George H. Lehleitner & Co., Inc. as described in the inventory.
4. Laundry equipment subject to the chattel mortgage in favor of United Machinery Corporation recorded at MOB 2438, folio 365, on January 24, 1984.
5. Refrigeration equipment subject to the chattel mortgages in favor of Warren Refrigeration Company recorded at MOB 2438, folio 550, on January 13, 1984; MOB 2456, folio 43, on May 7, 1984; and MOB 2459, folio 12, on May 21, 1984, as described in the inventory.

to First Financial Bank, F.S.B., for the total price and sum of \$5,250,000.00, all cash, free and clear of any and all liens and encumbrances except:

Chattel mortgage by Tulane Hotel Investors Limited Partnership in favor of United Machinery Corporation in the principal amount of \$27,012.00, recorded at MOB 2438, Folio 365 on January 24, 1984;

Chattel Mortgage by Tulane Hotel Investors Limited Partnership in favor of Warren Refrigeration Company in the principal amount of \$77,792.00, recorded at MOB 2438, Folio 550 on January 13, 1984;

Chattel Mortgage by Tulane Hotel Investors Limited Partnership in favor of Warren Refrigeration Company in the principal amount of \$16,280.78, recorded at MOB 2456, Folio 43 on May 7, 1984;

Chattel Mortgage by Tulane Hotel Investors Limited Partnership in favor of Warren Refrigeration Company in the principal amount of \$12,513.60, recorded at MOB 2459, Folio 12 on May 21, 1984.

be and the same is hereby approved.

IT IS FURTHER ORDERED, that the First Financial Bank, F.S.B., be and it is hereby ordered to pay to Marvin Kessler of Lemarco Associates, Inc., Auctioneer, fee of \$3,000.00, plus the reimbursement of expenses not to exceed \$5,000.00.

IT IS FURTHER ORDERED, that First Financial Bank, F.S.B., pay to the Trustee herein the sum of \$150,000.00 as previously agreed.

IT IS FURTHER ORDERED, that the Recorder of Mortgages for the Parish of Orleans cancel and erase all liens, mortgages and encumbrances bearing against the said property, to-wit:

- 1) State of Louisiana, Dept. of Employment Security Tax Assessment & Lien, Acct. #085164, Fountainbleau Hotel, a Louisiana Corp., due \$43,734.82, dated August 8, 1974,

- filed September 10, 1974 (NA 139736), recorded at MOB 2255, Folio 28;
- 2) Supplemental Chattel Mortgage in favor of Central States Southeast & Southwest Areas Pension Fund by Fountainbleau-Orleans in the principal amount of \$_____, recorded at MOB 2369, Folio 314 on May 4, 1981;
 - 3) Tax Lien against Fountainbleau-Orleans in favor of the State of Louisiana in the principal amount of \$15,678.28, recorded at MOB 2361, Folio 762 on December 22, 1981;
 - 4) Collateral Chattel Mortgage in favor of First Financial Bank by Tulane Hotel Investors Limited Partnership in the principal amount of \$10,000,000.00, recorded at MOB 2425, Folio 500 on September 19, 1983;
 - 5) Collateral Mortgage in favor of First Financial Bank by Tulane Hotel Investors Limited Partnership in the principal amount of \$15,000,000.00, recorded at MOB 2426, Folio 674 on September 19, 1983;
 - 6) Affidavit for No Work or Materials, recorded at MOB 2430, Folio 313 on September 19, 1983;
 - 7) Contract Sum in the principal amount of \$40,000.00, Agreement August 29, 1983, recorded at MOB 2430, Folio 425 on October 4, 1983;
 - 8) Contract Sum in the principal amount of \$1,453,261.00, Agreement September 2, 1983, recorded at MOB 2430, Folio 428 on October 4, 1983;

- 9) Contract Sum in the principal amount of \$20,000.00, Agreement August 29, 1983, recorded at MOB 2430, Folio 438 on October 4, 1983;
- 10) Chattel Mortgage in favor of United Machinery Corporation by Tulane Hotel Investors Limited Partnership, in the principal amount of \$27,012.00, recorded at MOB 2438, Folio 365 on January 24, 1984;
- 11) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of \$77,792.00, recorded at MOB 2438, Folio 550 on February 13, 1984;
- 12) Lien in favor of Gerald Seale in the principal amount of \$1,365.00, recorded at MOB 2433, Folio 778 on April 13, 1984;
- 13) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of \$16,280.78, recorded at MOB 2456, Folio 43 on May 7, 1984;
- 14) Lien in favor of Southland Plumbing Supply, Inc., in the principal amount of \$2,141.08, recorded at MOB 2470, Folio 301 on May 10, 1984;
- 15) Acceptance of Unrecorded Contract May 7, 1984, recorded at MOB 2452, Folio 309 on May 18, 1984;
- 16) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of \$12,513.60, recorded at MOB 2459, Folio 12 on May 21, 1984;

- 17) Lien in favor of T.N.T. Drywall Supplies, Inc., in the principal amount of \$3,801.91, recorded at MOB 2455, Folio 120 on June 1, 1984;
- 18) Lien in favor of Pelican Plumbing Supply, Inc., in the principal amount of \$44,153.87, recorded at MOB 2455, Folio 168 on June 13, 1984;
- 19) Lien in favor of American District Telegraph Co., in the principal amount of \$17,072.81, recorded at MOB 2455, Folio 179 on June 15, 1984;
- 20) Lien in favor of American District Telegraph Co., in the principal amount of \$6,441.33, recorded at MOB 2463, Folio 173 on July 11, 1984;
- 21) Lien in favor of Pool & Patio Center in the principal amount of \$7,275.29, recorded at MOB 2463, Folio 261 on July 16, 1984;
- 22) Lien in favor of Paddison Construction Co., in the principal amount of \$135,000.00, recorded at MOB 2463, Folio 270 on July 17, 1984;
- 23) Lien in favor of Commercial Painting Co., Inc., in the principal amount of \$8,655.38, recorded at MOB 2463, Folio 480 on July 30, 1984;
- 24) Lien in favor of Express Electric Co., Inc., in the principal amount of \$26,936.91, recorded at MOB 2463, Folio 498 on August 3, 1984;
- 25) Lien in favor of W. F. Keller Co., Inc., in the principal amount of \$9,793.00, recorded at MOB 2463, Folio 532 on August 8, 1984;

- 26) Lien in favor of Help Service Co., Inc., in the principal amount of \$18,396.47, recorded at MOB 2463, Folio 548 on August 10, 1984;
- 27) Lien in favor of Reliable Disposal Co., Inc., in the principal amount of \$2,160.00, recorded at MOB 2463, Folio 564 on August 15, 1984;
- 28) Lien in favor of R. C. Flooring in the principal amount of \$10,479.16, recorded at MOB 2463, Folio 574 on August 16, 1984;
- 29) Collateral Mortgage in the principal amount of \$5,000,000.00, before J. F. Quaid, Notary Public, recorded at MOB 2469, Folio 3 on August 17, 1984;
- 30) Lien in favor of Boes Iron Works in the principal amount of \$2,475.00, recorded at MOB 2470, Folio 44, on September 5, 1984;
- 31) Affidavit of Lis Pendens in favor of American District Telegraph Co., in the principal amount of \$17,072.81, recorded at MOB 2464, Folio 507 on September 7, 1984;
- 32) Affidavit of Lis Pendens in favor of American District Telegraph Co., in the principal amount of \$6,441.33, recorded at MOB 2464, Folio 507 on September 7, 1984;
- 33) Lien in favor of Wholesale Electric Supply Co., in the principal amount of \$6,435.85, at MOB 2470, Folio 109 on September 13, 1984;
- 34) Lien in favor of Orleans Roofing & Materials in the principal amount of \$12,024.38, recorded at MOB 2470, Folio 148 on September 18, 1984;

- 35) Lien in favor of Montgomery Elevator Company in the principal amount of \$135,621.40, recorded at MOB 2470, Folio 155 on September 19, 1984;
- 36) Lien in favor of Edward Maurer International, Inc., in the principal amount of \$55,600.00, recorded at MOB 2470, Folio 192 on September 21, 1984;
- 37) Lien in favor of Delta C.T. Patterson Co., Inc., in the principal amount of \$1,942.07, recorded at MOB 2470, Folio 204 on September 21, 1984;
- 33) [sic] Lien in favor of Southland Plumbing Supply, Inc., in the principal amount of \$2,141.08, recorded at MOB 2470, Folio 301 on October 5, 1984;
- 39) Lien in favor of Krogh Electric Supply, Inc., in the principal amount of \$5,792.61, recorded at MOB 2470, Folio 339 on October 11, 1984;
- 40) Notice of Pendency of Action in favor of Pelican Plumbing Supply, CDC 84-16988, recorded at MOB 2473, Folio 99 on October 12, 1984;
- 41) Lien in favor of Bassil's Ace Hardware in the principal amount of \$2,928.46, recorded at MOB 2470, Folio 441 on November 2, 1984;
- 42) Lien in favor of Nofie D. Alfonso, Jr. & Associates in the principal amount of \$26,361.00, recorded at MOB 2470, Folio 447 on November 2, 1984;

- 43) Lien in favor of Foster Co., Inc., in the principal amount of \$7,317.36, recorded at MOB 2479, Folio 96 on November 16, 1984;
- 44) Lien in favor of Bernard Lumber Co., Inc., in the principal amount of \$6,177.89, recorded at MOB 2479, Folio 216 on December 14, 1984;
- 45) Lien in favor of Foster Co., Inc., in the principal amount of \$17,317.36, recorded at MOB 2479, Folio 325 on January 8, 1985;
- 46) Seizure and Sale in favor of First Financial Bank (FSB) in the principal amount of \$10,622,001.63, CDC 85-8279, May 16, 1985, recorded at MOB 2493, Folio 457 on May 16, 1985;
- 47) Federal Tax Lien against Tulane Hotel Investors Corporation in the principal amount of \$2,198.39, recorded at FTL 28, Folio 174 on February 24, 1986;
- 48) Notice of Lis Pendens by Edmond G. Miranna, Jr., filed in MOB 2525, folio 360.

IT IS FURTHER ORDERED, that Jean Hebert Turner, Trustee herein, be and she is hereby authorized to execute any and all documents necessary to effectuate the transfer of the hereinabove described property to First Financial Bank, F.S.B., the successful bidder.

New Orleans, Louisiana, this 14th day of August, 1986.

/s/ T. H. Kingsmill, Jr.
T. H. KINGSMILL, JR.
 UNITED STATES
 BANKRUPTCY JUDGE

(3)

No. 96-1971

Supreme Court, U.S.

FILED

NOV 12 1997

CLERK

In The

Supreme Court of the United States
October Term, 1997

MARY ANNA RIVET, MINNA REE WINER, EDMOND G. MIRANNE, and EDMOND G. MIRANNE, JR.,

versus

Petitioners,

REGIONS BANK, WALTER L. BROWN, JR.,
 PERRY S. BROWN, and FOUNTAINBLEAU
 STORAGE ASSOCIATES,

Respondents.

**On Writ Of Certiorari To The United States
 Court Of Appeals For The Fifth Circuit**

JOINT APPENDIX

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*Attorneys for Petitioners *Counsel of Record*

(Additional Counsel Listed On Inside Cover)

**Petition For Writ Of Certiorari Filed June 11, 1997
 Certiorari Granted September 29, 1997**

9608

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and Perry S. Brown
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70825
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**RELEVANT DOCKET ENTRIES
APPEAL TERMED
MAG-1**

**U.S. District Court
USDC for the Eastern District of Louisiana (New Orleans)**

CIVIL DOCKET FOR CASE #: 95-CV-426

Rivet, et al v. Regions Bk of LA, et al Filed: 02/03/95
Assigned to:

Judge Charles Schwartz, Jr. Jury demand: Plaintiff
Demand: \$0,000 Nature of Suit: 220
Lead Docket: None Jurisdiction: Diversity
Dkt # in CDC Orleans Parish: is 94-20050 "H"

Cause: 28:1441 Petition for Removal - Insurance Contract

MARY ANNA RIVET
plaintiff

John Gregory Odom
[COR LD NTC]
Stuart E. DesRoches
[COR]
Law Offices of
John Gregory Odom
201 St. Charles Ave.
35th Floor, Place St. Charles
New Orleans, LA 70170-3500
(504) 522-0077

MINNA REE WINER
plaintiff

John Gregory Odom
(See above)
[COR LD NTC]
Stuart E. DesRoches
(See above)
[COR]

EDMOND G MIRANNE
plaintiff

John Gregory Odom
(See above)
[COR LD NTC]
Stuart E. DesRoches
(See above)
[COR]

EDMOND G MIRANNE, Jr.
plaintiff

John Gregory Odom
(See above)
[COR LD NTC]
Stuart E. DesRoches
(See above)
[COR]

v.

REGIONS BANK OF
LOUISIANA, F.S.B.
defendant

John M. Landis
(504) 581-3200
[COR LD NTC]
Stephanie D. Shuler
[COR]
Stone, Pigman, et al
546 Carondelet St.
New Orleans, LA 70130-3588
(504) 581-3200

WALTER L BROWN, JR
defendant

Charles R. Penot, Jr.
[COR LD NTC]
McGlinchey, Stafford, et al
643 Magazine St.
New Orleans, LA 70130
(504) 586-1200

Michael H. Rubin
(504) 383-1400
[COR NTC]
McGlinchey, Stafford
& Lang
One American Place
9th Floor
Baton Rouge, LA 70825
(504) 383-9000

PERRY S BROWN
defendant

Charles R. Penot, Jr.
(See above)
[COR LD NTC]

Michael H. Rubin
(See above)
[COR NTC]

FOUNTAINBLEAU
STORAGE ASSOCIATES
defendant

Charles Louis Stern, Jr.
[COR LD NTC]
Richard Thomas Gallagher
[COR]
Steeg & O'Connor
201 St. Charles Ave.
Suite 3201 – Place
St. Charles
New Orleans, LA 70170
(504) 582-1199

2/3/95 1 Notice of removal by defendant Regions Bk of LA, defendant Walter L Brown Jr, defendant Perry S Brown from Civil District Court, Parish of Orleans; Case Number: 94-20050 "H" (sw) [Entry date 02/07/95]

2/3/95 - Payment of filing fee by defendant Regions Bk of LA, defendant Walter L Brown Jr, defendant Perry S Brown, defendant Fountainbleau in amount of \$ 120.00 (sw) [Entry date 02/07/95]

2/3/95 2 Notice by defendant Regions Bk of LA, defendant Fountainbleau of related case 84-6127 "A" (sw) [Entry date 02/07/95]

2/7/95 3 MINUTE ENTRY 2/7/95: Case reassigned to Judge Charles Schwartz Jr. by Judge Stanwood R. Duval Jr. (sw) [Entry date 02/08/95]

2/7/95 4 ANSWER by defendant Fountainbleau to complaint and Counterclaim of same against plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr (rg) [Entry date 02/09/95]

2/14/95 5 ANSWER by defendant Walter L Brown Jr, defendant Perry S Brown to complaint by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr [1-1] (rg) [Entry date 02/15/95]

2/23/95 6 Motion by defendant Fountainbleau and ORDER for leave to file contents of state court record; by Judge Charles Schwartz Jr. Date Signed: 2/24/95 (rg) [Entry date 02/27/95]

2/23/95 - RETURN OF SERVICE of summons and complaint upon defendant Perry S Brown on 2/1/95 (STATE COURT) (rg) [Entry date 02/27/95]

2/23/95 - RETURN OF SERVICE of summons and complaint upon defendant Walter L Brown Jr on 2/7/95 (STATE COURT) (rg) [Entry date 02/27/95]

2/27/95 7 MOTION by defendant Regions Bk of LA for summary judgment to be heard before the Judge at 10:00 3/22/95 (rg)

3/6/95 8 MOTION by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr to remand to Civil District court for the parish of Orleans to be heard before the Judge at 10:00 3/22/95 (rg)

3/6/95 9 MOTION by defendant Walter L Brown Jr, defendant Perry S Brown for summary judgment to be heard before the Judge at 10:00 3/22/95 (rg)

3/6/95 11 Motion by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr to reset hrg on dfts mtn for sum jgm and UNSIGNED ORDER for same. (rg) [Entry date 03/13/95]

3/7/95 10 Motion by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr to reset hrg on dft's mtn for sum jgm and UNSIGNED ORDER. (rg) [Entry date 03/13/95]

3/10/95 12 MINUTE ENTRY (3/10/95): IT IS ORDERED that the dfts Regions Bank, Walter Brown, Jr. and Perry Brown motion for summary judgment [9-1] are CONT & RESET FOR 10:00 4/5/95. IT IS FURTHER ORDERED that the pla's motion to remand to Civil District court for the parish of Orleans [8-1] is CONT AND RESET FOR HRG at 10:00 4/5/95, setting motion for summary judgment [7-1] at 10:00 4/5/95; by judge Charles Schwartz Jr. (rg) [Entry date 03/13/95]

3/21/95 13 MOTION by defendant Fountainbleau for summary judgment to be heard before Judge at 10:00 4/5/95 (gw)

3/28/95 14 Memo in opposition by defendant Regions Bk of LA to motion to remand to Civil District court for the parish of Orleans [8-1] filed by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr (plr)

3/28/95 15 Memo in opposition by defendant Walter L Brown Jr, defendant Perry S Brown, defendant Fountainbleau to motion to remand to Civil District court for the parish of Orleans [8-1] filed by plaintiffs (cbn) [Entry date 03/30/95]

3/28/95 16 Memo in opposition by plaintiffs to motion for summary judgment [13-1], motion for summary judgment [9-1], motion for summary judgment [7-1] filed by defendants (cbn) [Entry date 03/30/95]

3/31/95 17 Motion by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr and ORDER for leave to file their reply memo in support of mtn to remand; by Judge Charles Schwartz Jr. Date Signed: 4/3/95 (rg) [Entry date 04/05/95]

4/4/95 18 Reply Memo by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr to dfts' response & in support of their motion to remand to Civil District court for the parish of Orleans [8-1] (rg) [Entry date 04/05/95]

4/4/95 19 Motion by defendant Walter L Brown Jr, defendant Perry S Brown and ORDER for leave to file their reply brief to pla's response to their mtn to remand & sum jgm; by Judge Charles Schwartz Jr. Date Signed: 4/5/96 (rg) [Entry date 04/06/95]

4/4/95 21 Motion by defendant Regions Bk of LA and ORDER for leave to file their Reply Memo in support of mtn for sum jgm; by Judge Charles Schwartz Jr. Date Signed: 4/6/95 (rg) [Entry date 04/10/95]

4/4/95 23 Motion by defendant Fountainbleau and ORDER for leave to file their suppl memo in support of mtn for sum jgm; by Judge Charles Schwartz Jr. Date Signed: 4/6/95 (rg) [Entry date 04/10/95]

4/5/95 25 Motion by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr and ORDER for leave to file 3 addl exhibits in opp to the mtns for sum jgm filed by all dfts; by Judge Charles Schwartz Jr. Date Signed: 4/6/95 (rg) [Entry date 04/10/95]

4/6/95 20 Reply Brief by defendant Walter L Brown Jr, defendant Perry S Brown to pla's response to dft's motion for summary judgment [9-1], and pla's motion to remand to Civil District court for the parish of Orleans [8-1] (rg)

4/6/95 22 Reply Memo by defendant Regions Bk of LA to pla's response to Regions motion for summary judgment [7-1] (rg) [Entry date 04/10/95]

4/6/95 24 Suppl Memorandum by defendant Fountainbleau in support of their motion for summary judgment [13-1] (rg) [Entry date 04/10/95]

4/20/95 26 ORDER AND REASONS: IT IS ORDERED that plas' mtn to remand is DENIED. FURTHER ORDERED that the mtns for sum jgm filed by dfts Regions

Bank, Walter L. Brown, Jr., Perry S. Brown & FSA are GRANTED. Clerk to enter jgm. [13-1] [9-1] [8-1] [7-1] by Judge Charles Schwartz Jr. (rg) [Entry date 04/21/95]

4/26/95 27 JUDGMENT: IT IS ORDERED that there be jgm in favor of dfts Regions Bank of Louisiana, Walter L. Brown, Jr., Perry Brown, and Fountainbleau Storage Associates & agst plas Mary Rivet, Minna Winer, Edmond Miranne, & Edmond Miranne, Jr., dismissing plas claims w/prej, plas to bear all costs; by Clerk approved as to form by: Judge Charles Schwartz Jr. Date signed: 4/25/95 (CLOSED) (rg) [Entry date 04/27/95]

5/19/95 28 Notice of appeal by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr from Dist. Court decision, the order & reasons entered 4/21/95 and the jgm entered 4/27/95. (rg)

5/19/95 29 TRANSCRIPT Order Form by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr. Transcript unnecessary for appeal purposes. (rg) [Entry date 05/23/95]

5/19/95 - Payment of appeal fee by plaintiff Mary Anna Rivet in amount of \$ 105.00 (rg) [Entry date 05/23/95]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
IN THE MATTER OF: NO. 84-02145-K
TULANE HOTEL INVESTORS
LIMITED PARTNERSHIP
DEBTOR CHAPTER 7
(Filed
August 15, 1986)

ORDER

Considering the foregoing application by the Trustee for approval of employment of auctioneer, approval of sale by public auction, free and clear of any and all interests, claims, liens, mortgages and encumbrances, and approval of letter agreement by and between the Trustee and First Financial Bank, F.S.B., it is:

HEREBY ORDERED BY THIS HONORABLE COURT that creditors and parties in interest of this estate are given until the 12 day of June, 1986, to service any objection to the sale on the Trustee, and to file such objection with the Clerk of the U. S. Bankruptcy Court, 500 Camp Street, New Orleans, Louisiana.

FURTHER ORDERED BY THIS HONORABLE COURT that if objections are received, a hearing will be held before the undersigned bankruptcy judge on the 16th day of June, 1986, at 9:00 o'clock A.m., in Room C-104, U. S. Bankruptcy Court, 500 Camp Street, New Orleans, Louisiana.

FURTHER ORDERED BY THIS HONORABLE COURT that if no objections are received this Honorable

Court hereby authorizes the employment of Marvin Kessler of Lemarco and Associates as auctioneer at a fee of \$3,000.00, plus the reimbursement of expenses not to exceed \$5,000.00; that this Honorable Court authorizes the sale by public auction as set forth in said application, on the 31 day of July, 1986, at 10:30 o'clock A.m., at 4040 Tulane Ave, free and clear of any and all interests, claims, liens, mortgages and encumbrances, and approves the letter agreement by and between the Trustee and First Financial Bank, F.S.B.

New Orleans, Louisiana, this 18th day of April, 1986.

/s/ T. H. Kingsmill, Jr.
T. H. KINGSMILL, JR.
U. S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: CASE NO. 84-02145K
 TULANE HOTEL INVESTORS CHAPTER 11
 LIMITED PARTNERSHIP CONVERTED TO
 DEBTOR CHAPTER 7
(Filed Jun. 19, 1986)

ORDER AUTHORIZING EMPLOYMENT
OF AUCTIONEER AND SALE BY PUBLIC AUCTION
OF PROPERTY FREE AND CLEAR OF ANY
AND ALL INTERESTS, CLAIMS, LIENS,
MORTGAGES AND ENCUMBRANCES

On the 16th day of June, 1986, came on for hearing the Trustee's Application For Approval Of Employment Of Auctioneer And For Approval Of Sale By Public Auction, Free And Clear Of Any And All Interests, Claims, Liens, Mortgages And Encumbrances.

APPEARANCES:

Emile L. Turner, Jr.	- attorney for Jean Hebert Turner, Trustee (hereinafter "the Trustee")
J. Michael Dendy	- Attorney for Walter Brown
Edmond G. Miranne, Jr.	- Attorney for Edmond. G. Miranne, Jr. and Edmond G. Miranne, Sr.
Lee C. Grevemberg	- Attorney for Tulane Hotel Investors Corporation, Tulane Hotel Investors

Limited Partnership,
Barry Trinchard, and Nor-
man Parent

Alwynn J. Cronvich - Attorney for McCann Electronics

It appearing that all creditors and parties in interest have been given the required notice, opportunity to object and be heard; further that this Court has determined that the sale is in the best interest of the estate and the public auction represents the best method of obtaining the best possible price under the circumstances of the property being sold, therefore:

IT IS HEREBY ORDERED that:

- 1) The Trustee is authorized to sell at public auction the property known as the Bayou Plaza Hotel, as more particularly described in Exhibits "A" and "B" attached hereto, less and except the property described in Exhibit "C" attached hereto;
- 2) The sale will be free and clear of any and all interests, claims, liens, mortgages and encumbrances including without limitation those items detailed on Exhibit "D" attached hereto (with exception made for those certain chattel mortgages as shown on Exhibit "C");
- 3) The Trustee is authorized to employ Marvin Kessler of Lemarco and Associates as auctioneer at the public auction sale, said auctioneer to receive \$3,000.00 as compensation for services rendered plus the reimbursement of expenses not to exceed \$5,000.00, which amounts shall be paid by the Bank after completion of the public auction sale;

- 4) The terms of the sale by public auction shall be
 - (a) minimum opening bid of \$5,250,000.00, which sum equals seventy-five (75%) percent of the appraised value of the property as found by the Court in its Judgment signed June 9, 1986; (b) the minimum opening bid shall be guaranteed by the Bank upon the terms and conditions as set forth in the letter agreement as shown in Exhibit "E" attached hereto, which terms and conditions are approved by the Court; (c) the Bank's minimum bid may be as a credit against the secured indebtedness in favor of the Bank; and (d) all bids other than that of the Bank shall be cash payable by ten (10%) percent non-refundable deposit at time of auction and balance payable not later than thirty (30) days from auction date.
- 5) In the event that the minimum bid by the Bank is exceeded, then the Trustee is authorized to distribute the sale proceeds first retaining the net amount of \$150,000.00 for the estate; secondly, the balance of the proceeds shall be paid to the Bank in whole or partial payment of its secured claim;
- 6) Upon completion of the sale to the successful bidder, and receipt of the purchase price, Trustee is authorized and directed to execute and deliver a deed conveying unto the successful bidder the property as outlined in Paragraphs (1) and (2) *supra* and any and all other documents necessary to comply with the terms and conditions of the letter agreement attached as Exhibit "E";
- 7) Upon certification by the Trustee that the sale by public auction and conveyance to the successful bidder is complete, the Recorder of Mortgages for the Parish of Orleans, State of Louisiana, is hereby authorized and directed to cancel and

erase from the public records of his office all liens, mortgages and encumbrances, but only insofar as they may affect the property described in Exhibits "A" and "B" attached hereto, including without limitation, those liens, mortgages and encumbrances as shown on Exhibit "D" attached hereto except for those certain chattel mortgages as shown on Exhibit "C" attached hereto.

SO ORDERED, this 17th day of June, 1986, at New Orleans, Louisiana.

/s/ T.H. Kingsmill, Jr.
U. S. BANKRUPTCY JUDGE

EXHIBIT D

- 1) State of Louisiana, Dept. of Employment Security Tax Assessment & Liens Acct. #085164, Fountainbleau Hotel, a Louisiana corp., due \$43,734.82, dated August 8, 1974, filed September 10, 1974 (NA 139736), recorded at MOB 2255, Folio 28;
- 2) Supplemental Chattel Mortgage in favor of Central States Southeast & Southwest Areas Pension Fund by Fountainbleau-Orleans in the principal amount of \$_____, recorded at MOB 2369, Folio 314 on May 4, 1981;
- 3) Tax Lien against Fountainbleau-Orleans in favor of the State of Louisiana in the principal amount of \$15,678.28, recorded at MOB 2361, Folio 762 on December 22, 1981;

- 4) Collateral Chattel Mortgage in favor of First Financial Bank by Tulane Hotel Investors Limited Partnership in the principal amount of \$10,000,000.00, recorded at MOB 2425, Folio 500 on September 19, 1983;
- 5) Collateral Mortgage in favor of First Financial Bank by Tulane Hotel Investors Limited Partnership in the principal amount of \$15,000,000.00, recorded at MOB 2426, Folio 674 on September 19, 1983;
- 6) Affidavit for No Work or Materials, recorded at MOB 2430, Folio 313 on September 19, 1983;
- 7) Contract Sum in the principal amount of \$40,000.00, Agreement August 29, 1983, recorded at MOB 2430, Folio 425 on October 4, 1983;
- 8) Contract Sum in the principal amount of \$1,453,261.00, Agreement September 2, 1983, recorded at MOB 2430, Folio 428 on October 4, 1983;
- 9) Contract Sum in the principal amount of \$20,000.00, Agreement August 29, 1983, recorded at MOB 2430, Folio 438 on October 4, 1983;
- 10) Chattel Mortgage in favor of United Machinery Corporation by Tulane Hotel Investors Limited Partnership, in the principal amount of \$27,012.00, recorded at MOB 2438, Folio 365 on January 24, 1984;
- 11) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of \$77,792.00, recorded at MOB 2438, Folio 550 on February 13, 1984;
- 12) Lien in favor of Gerald Seale in the principal amount of \$1,365.00, recorded at MOB 2433, Folio 778 on April 13, 1984;
- 13) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership,

- in the principal amount of \$16,280.78, recorded at MOB 2456, Folio 43 on May 7, 1984;
- 14) Lien in favor of Southland Plumbing Supply, Inc., in the principal amount of \$2,141.08, recorded at MOB 2470, Folio 301 on May 10, 1984;
 - 15) Acceptance of Unrecorded Contract May 7, 1984, recorded at MOB 2452, Folio 309 on May 18, 1984;
 - 16) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of \$12,513.60, recorded at MOB 2459, Folio 12 on May 21, 1984;
 - 17) Lien in favor of T.N.T. Drywall Supplies, Inc., in the principal amount of \$3,801.91, recorded at MOB 2455, Folio 120 on June 1, 1984;
 - 18) Lien in favor of Pelican Plumbing Supply, Inc., in the principal amount of \$44,153.87, recorded at MOB 2455, Folio 168 on June 13, 1984;
 - 19) Lien in favor of American District Telegraph Co., in the principal amount of \$17,072.81, recorded at MOB 2455, Folio 179 on June 15, 1984;
 - 20) Lien in favor of American District Telegraph Co., in the principal amount of \$6,441.33, recorded at MOB 2463, Folio 173 on July 11, 1984;
 - 21) Lien in favor of Pool & Patio Center in the principal amount of \$7,275.29, recorded at MOB 2463, Folio 261 on July 16, 1984;
 - 22) Lien in favor of Paddison Construction Co., in the principal amount of \$135,000.00, recorded at MOB 2463, Folio 270 on July 17, 1984;
 - 23) Lien in favor of Commercial Painting Co., Inc., in the principal amount of \$8,655.38, recorded at MOB 2463, Folio 480 on July 30, 1984;

- 24) Lien in favor of Express Electric Co., Inc., in the principal amount of \$26,936.91, recorded at MOB 2463, Folio 498 on August 3, 1984;
- 25) Lien in favor of W. F. Keller Co., Inc., in the principal amount of \$9,793.00, recorded at MOB 2463, Folio 532 on August 8, 1984;
- 26) Lien in favor of Help Service Co., Inc., in the principal amount of \$18,396.47, recorded at MOB 2463, Folio 548 on August 10, 1984;
- 27) Lien in favor of Reliable Disposal Co., Inc., in the principal amount of \$2,160.00, recorded at MOB 2463, Folio 564 on August 15, 1984;
- 28) Lien in favor of R. C. Flooring in the principal amount of \$10,479.16, recorded at MOB 2463, Folio 574 on August 16, 1984;
- 29) Collateral Mortgage in the principal amount of \$5,000,000.00, before J. F. Quaid, Notary Public, recorded at MOB 2469, Folio 3 on August 17, 1984;
- 30) Lien in favor of Boes Iron Works in the principal amount of \$2,475.00, recorded at MOB 2470, Folio 44, on September 5, 1984;
- 31) Affidavit of Lis Pendens in favor of American District Telegraph Co., in the principal amount of \$17,072.81, recorded at MOB 2464, Folio 507 on September 7, 1984;
- 32) Affidavit of Lis Pendens in favor of American District Telegraph Co., in the principal amount of \$6,441.33, recorded at MOB 2464, Folio 507 on September 7, 1984;
- 33) Lien in favor of Wholesale Electric Supply Co., in the principal amount of \$6,435.85 at MOB 2470, Folio 109 on September 13, 1984;

- 34) Lien in favor of Orleans Roofing & Materials in the principal amount of \$12,024.38, recorded at MOB 2470, Folio 148 on September 18, 1984;
- 35) Lien in favor of Montgomery Elevator Company in the principal amount of \$135,621.40, recorded at MOB 2470, Folio 155 on September 19, 1984;
- 36) Lien in favor of Edward Maurer International, Inc., in the principal amount of \$55,600.00, recorded at MOB 2470, Folio 192 on September 21, 1984;
- 37) Lien in favor of Delta C.T. Patterson Co., Inc., in the principal amount of \$1,942.07, recorded at MOB 2470, Folio 204 on September 21, 1984;
- 38) [sic] Lien in favor of Southland Plumbing Supply, Inc., in the principal amount of \$2,141.08, recorded at MOB 2470, Folio 301 on October 5, 1984;
- 39) Lien in favor of Krogh Electric Supply, Inc., in the principal amount of \$5,792.61, recorded at MOB 2470, Folio 339 on October 11, 1984;
- 40) Notice of Pendency of Action in favor of Pelican Plumbing Supply, CDC 84-16988, recorded at MOB 2473, Folio 99 on October 12, 1984;
- 41) Lien in favor of Bassil's Ace Hardware in the principal amount of \$2,928.46, recorded at MOB 2470, Folio 441 on November 2, 1984;
- 42) Lien in favor of Nofie D. Alfonso, Jr. & Associates in the principal amount of \$26,361.00, recorded at MOB 2470, Folio 447 on November 2, 1984;
- 43) Lien in favor of Foster Co., Inc., in the principal amount of \$7,317.36, recorded at MOB 2479, Folio 96 on November 16, 1984;
- 44) Lien in favor of Bernard Lumber Co., Inc., in the principal amount of \$6,177.89, recorded at MOB 2479, Folio 216 on December 14, 1984;

- 45) Lien in favor of Foster Co., Inc., in the principal amount of \$17,317.36, recorded at MOB 2479, Folio 325 on January 8, 1985;
- 46) Seizure and Sale in favor of First Financial Bank (FSB) in the principal amount of \$10,622,001.63, CDC 85-8279, May 16, 1985, recorded at MOB 2493, Folio 457 on May 16, 1985;
- 47) Federal Tax Lien against Tulane Hotel Investors Corporation in the principal amount of \$2,198.39, recorded at FTL 28, Folio 174 on February 24, 1986;
- 48) Edmond G. Miranne, Sr., guarantor of the loan by First Financial Bank to Tulane Hotel Investors Limited Partnership, and claimant in the following proceedings:
 - a) "First Financial Bank versus Virginia Copeland, wife of/and Edward F. Butler". Case Number 303-674 of the Docket of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana;
 - b) "First Financial Bank versus Wendy Early, wife of/and Norman A. Parent", Case Number 303-675 of the Docket of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana;
 - c) "First Financial Bank versus Barry Trinchard", Case Number 303-676 of the Docket of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana;
 - d) "Tulane Hotel Investors Corporation, et al vs. First Financial Bank, F.S.B. et al", Case Number 84-6127 of the Docket of the United States District Court for the Eastern District of Louisiana;
 - e) "Tulane Hotel Investors Limited Partnership, et al vs. First Financial Bank, F.S.B.", Case Number

- 85-7028 of the Civil District Court for the Parish of Orleans, State of Louisiana;
- f) "First Financial Bank, F.S.B. vs. Tulane Hotel Investors Limited Partnership", Case No. 85-8279 of the Docket of the Civil District Court for the Parish of Orleans, State of Louisiana;
- 49) Mary Anna Rivet/wife of Edmond G. Miranne, Sr., and claimant in proceedings enumerated in Section 50, *supra*;
- 50) Edmond G. Miranne, Jr., limited partner of Tulane Hotel Investors Limited Partnership, and claimant in proceedings enumerated in Section 50, *supra*;
- 51) Minna Ree Weiner/wife of Edmond G. Miranne, Jr., and claimant in proceedings enumerated in Section 50, *supra*;
- 52) Barry Trinchard, limited partner of Tulane Hotel Investors Limited Partnership, and claimant in proceedings enumerated in Section 50, *supra*;
- 53) Norman A. Parent, limited partner of Tulane Hotel Investors Limited Partnership, and claimant in proceedings enumerated in Section 50, *supra*;
- 54) Wendy Early/wife of Norman A. Parent, and claimant in proceedings enumerated in Section 50, *supra*;
- 55) Tulane Hotel Investors Corporation, corporate general partner of Tulane Hotel Investors Limited Partnership and claimant in proceedings enumerated in Section 50, *supra*;
- 56) Edward F. Butler, limited partner of Tulane Hotel Investors Limited Partnership, and claimant in proceedings enumerated in Section 50, *supra*;
- 57) Virginia Copeland/wife of and Edward F. Butler and claimant in proceedings enumerated in Section 50, *supra*;

- 58) Riverbank Mortgage Company, whatever interest may exist as a mortgage broker;
 - 59) Sue Brignac, whatever interest she may have as a party in interest.
 - 60) Notice of Lis Pendens by Edmond G. Miranne, Jr., in regard to the following proceedings:
 - a) "Tulane Hotel Investors Limited Partnership, et al vs. First Financial Bank, FSB, et al, bearing docket number 84-6127 of the United States District Court for the Eastern District of Louisiana;
 - b) "Tulane Hotel Investors Limited Partnership, et al vs. First Financial Bank, FSB", bearing docket number 85-7028 of the Civil District Court for the Parish of Orleans, State of Louisiana;
 - c) "First Financial Bank, FSB vs. Tulane Hotel Investors Limited Partnership", bearing docket number 85-8279 of the Civil District Court for the Parish of Orleans, State of Louisiana;
 - d) "First Financial Bank, FSB vs. Virginia Copeland, wife of, and Edward F. Butler", bearing docket number 303-674 of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana;
 - e) "First Financial Bank, FSB vs. Wendy Early, wife of, and Norman A. Parent", bearing docket number 303-675 of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana;
 - f) "First Financial Bank, FSB vs. Barry Trinchard", bearing docket number 303-676 of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana.
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF: * NO. 84-02145-K
TULANE HOTEL * IN BANKRUPTCY
INVESTORS LIMITED *
PARTNERSHIP *
DEBTOR *

ORDER

Considering the foregoing Application of the Trustee herein, it is:

HEREBY ORDERED that the public auction sale held in the above captioned matter on Monday, August 11, 1986, at 2:00 p.m. in the Etouffe Dining Room, First Floor Bayou Plaza Hotel, 4040 Tulane Avenue, New Orleans, Louisiana, of the following:

A. All of the Debtor's Leasehold interest and estate, and all right, title, interest and privileges in and under that certain lease made and entered into by and between Mrs. Lois Stern, wife of Walter Brown (and the said Walter Brown by intervention), as lessor and Pelican State Hotels Corporation, as lessee, dated October 4, 1957 and duly registered in COB 622, folio 126 on November 5, 1957, as amended May 22, 1958 and duly registered in COB 621, folio 595 on June 6, 1958; all of the right, title and interest of Pelican State Hotels Corporation was acquired by H. R. Weissberg Corporation by Agreement of Merger dated December 19, 1961 and duly registered in COB 644, folio 287, on

March 20, 1962; and all of the right, title and interest of Pennsylvania Real Estate Investment Trust was acquired by act under private signature, dated April 23, 1965, and duly registered in COB 668B, folio 254 on April 26, 1965. Fontainebleau-Orleans acquired said interest by act before Louis G. Dutel, Jr., N.P., dated December 30, 1975, COB 738A, folio 406.

B. All of the interest of the estate in and to the buildings and improvements located and/or situated on the following described property bearing municipal number 4000 Tulane Avenue, City of New Orleans, State of Louisiana, together with all the rights, ways, privileges, servitudes and appurtenances thereunto belonging or in anywise appertaining, situated on the leasehold hereinabove described and consisting more particularly of the following described property:

THAT CERTAIN PORTION OF GROUND, together with all rights, ways, privileges, servitudes, appurtenances and advantages thereunto belonging or in anywise appertaining, situated in the First District of the City of New Orleans, designated as SQUARE NO. 763, bounded by Tulane and Carrollton Avenues and Gravier and South Pierce Streets, and according to a survey made by F. C. Gandolfo, Jr., Surveyor, dated July 7, 1937, a blue print copy of which is annexed to an Act before Robert Legier, Notary Public, on March 21, 1941, which survey was redated December 16, 1947, a blue print copy of which survey was annexed to an Act before Ernest Carrere, Jr., Notary Public, on December 22, 1947, said square measures 425 feet, 7 inches, 2 lines, actual, 424 feet, 2 inches, 6 lines, title, front on Carrollton Avenue, 425 feet, 9 inches,

no lines actual, 425 feet, 6 inches, 2 lines title, front on South Pierce Street, 604 feet, 3 inches, 5 lines actual, 602 feet, 11 inches, 2 lines title, front on Tulane Avenue, and 642 feet, 1 inch, 3 lines actual, 642 feet, 3 inches, no lines title, front on Gravier Street.

C. All of the estate's right, title and interest in and to that certain machinery, equipment, furniture, fixtures and/or all other property, of every nature and kind whatsoever, that has been placed in, upon or above the property hereinabove described for the service and operation of the buildings and improvements thereon or which is located thereon for the use of the Debtor, either directly or indirectly in such service or operation (less and except that property subject to the exception noted on Exhibit "B");

D. All of the estate's right, title and interest in and to those existing leases and/or subleases granted by Pelican State Hotels Corporation, H. R. Weissberg Corporation, "The Fontainebleau Motor Hotel", Pennsylvania Real Estate Investment Trust, Fontainebleau Hotel Corporation, and/or the Debtor as Lessor(s), to any present tenants, occupants, licensees, franchise and/or concession holders;

E. All of the Debtor's leasehold interest and estate, and all right, title, interest and privileges in and under that certain lease made and entered into by and between the City of New Orleans, Louisiana, as lessor, and Fontainebleau-Orleans, an Ordinary Partnership in Commendam, as lessee, said lease being authorized by ordinance Number 6134 dated September 30, 1976 and approved by the City Council on October 21, 1976, and the Mayor of the City

of New Orleans, Louisiana on October 22, 1976, and duly recorded in COB 743E, folio 118-124 of the conveyance records for the Parish of Orleans, on December 20, 1976.

Together with all buildings and improvements, appurtenances and attachments, rights, ways, privileges, servitudes, advantages, batture and batture rights, thereunto belonging or in anywise appertaining, including all immovables by nature or destination, and their component parts, now or hereafter forming part of and attached to or connected with said property or used in connection therewith.

F. All corporeal movables owned by the Debtor that are now and from time to time shall be located upon the above described premises for use in the conduct and/or operation of the hereinabove business and commercial activity, namely the hotel/motel now known as the Bayou Plaza Hotel including without limitation all equipment, furniture, television sets (less and except the television sets described in Section C hereof), fixtures of every kind and description, without exception that are now or may come upon the premises; and

G. All right, title and interest in and to that certain mass or assemblage of food and restaurant supplies, including canned and frozen foods, beer, wine and other alcohol beverages and soft drinks, constituting the entire stock of supplies and inventory of the Debtor now located and to be located at its place of business known as the Bayou Plaza Hotel located at 4040 Tulane Avenue, New Orleans, Louisiana 70119.

H. Less and except (a) certain television equipment; (b) certain private cable equipment leased

from McCann Electronics; (c) certain equipment leased from First Continental Leasing Corporation; (d) certain laundry equipment; (e) certain refrigeration equipment.

1. Equipment for private cable system owned and leased by Malcolm G. McCann, Jr., McCann Electronics, as described in the inventory.
2. Equipment owned and leased by First Continental Leasing Corporation as described in the three leases.
3. Television equipment and accessories subject to the vendor's lien of George H. Lehleitner & Co., Inc. as described in the inventory.
4. Laundry equipment subject to the chattel mortgage in favor of United Machinery Corporation recorded at MOB 2438, folio 365, on January 24, 1984.
5. Refrigeration equipment subject to the chattel mortgages in favor of Warren Refrigeration Company recorded at MOB 2438, folio 550, on January 13, 1984; MOB 2456, folio 43, on May 7, 1984; and MOB 2459, folio 12, on May 21, 1984, as described in the inventory.

to First Financial Bank, F.S.B., for the total price and sum of \$5,250,000.00, all cash, free and clear of any and all liens and encumbrances except:

Chattel mortgage by Tulane Hotel Investors Limited Partnership in favor of United Machinery Corporation in the principal amount of \$27,012.00, recorded at MOB 2438, Folio 365 on January 24, 1984;

Chattel Mortgage by Tulane Hotel Investors Limited Partnership in favor of Warren Refrigeration Company in the principal amount of \$77,792.00, recorded at MOB 2438, Folio 550 on January 13, 1984;

Chattel Mortgage by Tulane Hotel Investors Limited Partnership in favor of Warren Refrigeration Company in the principal amount of \$16,280.78, recorded at MOB 2456, Folio 43 on May 7, 1984;

Chattel Mortgage by Tulane Hotel Investors Limited Partnership in favor of Warren Refrigeration Company in the principal amount of \$12,513.60, recorded at MOB 2459, Folio 12 on May 21, 1984.

be and the same is hereby approved.

IT IS FURTHER ORDERED, that the First Financial Bank, F.S.B., be and it is hereby ordered to pay to Marvin Kessler of Lemarco Associates, Inc., Auctioneer, fee of \$3,000.00, plus the reimbursement of expenses not to exceed \$5,000.00.

IT IS FURTHER ORDERED, that First Financial Bank, F.S.B., pay to the Trustee herein the sum of \$150,000.00 as previously agreed.

IT IS FURTHER ORDERED, that the Recorder of Mortgages for the Parish of Orleans cancel and erase all liens, mortgages and encumbrances bearing against the said property, to-wit:

- 1) State of Louisiana, Dept. of Employment Security Tax Assessment & Lien, Acct. #085164, Fountainbleau Hotel, a Louisiana Corp., due \$43,734.82, dated August 8, 1974,

filed September 10, 1974 (NA 139736), recorded at MOB 2255, Folio 28;

- 2) Supplemental Chattel Mortgage in favor of Central States Southeast & Southwest Areas Pension Fund by Fountainbleau-Orleans in the principal amount of \$_____, recorded at MOB 2369, Folio 314 on May 4, 1981;
- 3) Tax Lien against Fountainbleau-Orleans in favor of the State of Louisiana in the principal amount of \$15,678.28, recorded at MOB 2361, Folio 762 on December 22, 1981;
- 4) Collateral Chattel Mortgage in favor of First Financial Bank by Tulane Hotel Investors Limited Partnership in the principal amount of \$10,000,000.00, recorded at MOB 2425, Folio 500 on September 19, 1983;
- 5) Collateral Mortgage in favor of First Financial Bank by Tulane Hotel Investors Limited Partnership in the principal amount of \$15,000,000.00, recorded at MOB 2426, Folio 674 on September 19, 1983;
- 6) Affidavit for No Work or Materials, recorded at MOB 2430, Folio 313 on September 19, 1983;
- 7) Contract Sum in the principal amount of \$40,000.00, Agreement August 29, 1983, recorded at MOB 2430, Folio 425 on October 4, 1983;
- 8) Contract Sum in the principal amount of \$1,453,261.00, Agreement September 2, 1983, recorded at MOB 2430, Folio 428 on October 4, 1983;

- 9) Contract Sum in the principal amount of \$20,000.00, Agreement August 29, 1983, recorded at MOB 2430, Folio 438 on October 4, 1983;
- 10) Chattel Mortgage in favor of United Machinery Corporation by Tulane Hotel Investors Limited Partnership, in the principal amount of \$27,012.00, recorded at MOB 2438, Folio 365 on January 24, 1984;
- 11) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of \$77,792.00, recorded at MOB 2438, Folio 550 on February 13, 1984;
- 12) Lien in favor of Gerald Seale in the principal amount of \$1,365.00, recorded at MOB 2433, Folio 778 on April 13, 1984;
- 13) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of \$16,280.78, recorded at MOB 2456, Folio 43 on May 7, 1984;
- 14) Lien in favor of Southland Plumbing Supply, Inc., in the principal amount of \$2,141.08, recorded at MOB 2470, Folio 301 on May 10, 1984;
- 15) Acceptance of Unrecorded Contract May 7, 1984, recorded at MOB 2452, Folio 309 on May 18, 1984;
- 16) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of \$12,513.60, recorded at MOB 2459, Folio 12 on May 21, 1984;

- 17) Lien in favor of T.N.T. Drywall Supplies, Inc., in the principal amount of \$3,801.91, recorded at MOB 2455, Folio 120 on June 1, 1984;
- 18) Lien in favor of Pelican Plumbing Supply, Inc., in the principal amount of \$44,153.87, recorded at MOB 2455, Folio 168 on June 13, 1984;
- 19) Lien in favor of American District Telegraph Co., in the principal amount of \$17,072.81, recorded at MOB 2455, Folio 179 on June 15, 1984;
- 20) Lien in favor of American District Telegraph Co., in the principal amount of \$6,441.33, recorded at MOB 2463, Folio 173 on July 11, 1984;
- 21) Lien in favor of Pool & Patio Center in the principal amount of \$7,275.29, recorded at MOB 2463, Folio 261 on July 16, 1984;
- 22) Lien in favor of Paddison Construction Co., in the principal amount of \$135,000.00, recorded at MOB 2463, Folio 270 on July 17, 1984;
- 23) Lien in favor of Commercial Painting Co., Inc., in the principal amount of \$8,655.38, recorded at MOB 2463, Folio 480 on July 30, 1984;
- 24) Lien in favor of Express Electric Co., Inc., in the principal amount of \$26,936.91, recorded at MOB 2463, Folio 498 on August 3, 1984;
- 25) Lien in favor of W. F. Keller Co., Inc., in the principal amount of \$9,793.00, recorded at MOB 2463, Folio 532 on August 8, 1984;

- 26) Lien in favor of Help Service Co., Inc., in the principal amount of \$18,396.47, recorded at MOB 2463, Folio 548 on August 10, 1984;
- 27) Lien in favor of Reliable Disposal Co., Inc., in the principal amount of \$2,160.00, recorded at MOB 2463, Folio 564 on August 15, 1984;
- 28) Lien in favor of R. C. Flooring in the principal amount of \$10,479.16, recorded at MOB 2463, Folio 574 on August 16, 1984;
- 29) Collateral Mortgage in the principal amount of \$5,000,000.00, before J. F. Quaid, Notary Public, recorded at MOB 2469, Folio 3 on August 17, 1984;
- 30) Lien in favor of Boes Iron Works in the principal amount of \$2,475.00, recorded at MOB 2470, Folio 44, on September 5, 1984;
- 31) Affidavit of Lis Pendens in favor of American District Telegraph Co., in the principal amount of \$17,072.81, recorded at MOB 2464, Folio 507 on September 7, 1984;
- 32) Affidavit of Lis Pendens in favor of American District Telegraph Co., in the principal amount of \$6,441.33, recorded at MOB 2464, Folio 507 on September 7, 1984;
- 33) Lien in favor of Wholesale Electric Supply Co., in the principal amount of \$6,435.85, at MOB 2470, Folio 109 on September 13, 1984;
- 34) Lien in favor of Orleans Roofing & Materials in the principal amount of \$12,024.38, recorded at MOB 2470, Folio 148 on September 18, 1984;

- 35) Lien in favor of Montgomery Elevator Company in the principal amount of \$135,621.40, recorded at MOB 2470, Folio 155 on September 19, 1984;
- 36) Lien in favor of Edward Maurer International, Inc., in the principal amount of \$55,600.00, recorded at MOB 2470, Folio 192 on September 21, 1984;
- 37) Lien in favor of Delta C.T. Patterson Co., Inc., in the principal amount of \$1,942.07, recorded at MOB 2470, Folio 204 on September 21, 1984;
- 38) [sic] Lien in favor of Southland Plumbing Supply, Inc., in the principal amount of \$2,141.08, recorded at MOB 2470, Folio 301 on October 5, 1984;
- 39) Lien in favor of Krogh Electric Supply, Inc., in the principal amount of \$5,792.61, recorded at MOB 2470, Folio 339 on October 11, 1984;
- 40) Notice of Pendency of Action in favor of Pelican Plumbing Supply, CDC 84-16988, recorded at MOB 2473, Folio 99 on October 12, 1984;
- 41) Lien in favor of Bassil's Ace Hardware in the principal amount of \$2,928.46, recorded at MOB 2470, Folio 441 on November 2, 1984;
- 42) Lien in favor of Nofie D. Alfonso, Jr. & Associates in the principal amount of \$26,361.00, recorded at MOB 2470, Folio 447 on November 2, 1984;

- 43) Lien in favor of Foster Co., Inc., in the principal amount of \$7,317.36, recorded at MOB 2479, Folio 96 on November 16, 1984;
- 44) Lien in favor of Bernard Lumber Co., Inc., in the principal amount of \$6,177.89, recorded at MOB 2479, Folio 216 on December 14, 1984;
- 45) Lien in favor of Foster Co., Inc., in the principal amount of \$17,317.36, recorded at MOB 2479, Folio 325 on January 8, 1985;
- 46) Seizure and Sale in favor of First Financial Bank (FSB) in the principal amount of \$10,622,001.63, CDC 85-8279, May 16, 1985, recorded at MOB 2493, Folio 457 on May 16, 1985;
- 47) Federal Tax Lien against Tulane Hotel Investors Corporation in the principal amount of \$2,198.39, recorded at FTL 28, Folio 174 on February 24, 1986;
- 48) Notice of Lis Pendens by Edmond G. Miranna, Jr., filed in MOB 2525, folio 360.

IT IS FURTHER ORDERED, that Jean Hebert Turner, Trustee herein, be and she is hereby authorized to execute any and all documents necessary to effectuate the transfer of the hereinabove described property to First Financial Bank, F.S.B., the successful bidder.

New Orleans, Louisiana, this 14th day of August, 1986.

/s/ T. H. Kingsmill, Jr.
T. H. KINGSMILL, JR.
UNITED STATES
BANKRUPTCY JUDGE

**Official Mortgage Certificate,
Prepared by the Recorder of Mortgages
of Orleans Parish, State of Louisiana**

MICHAEL P. McCROSSEN

**STATE OF LOUISIANA - PARISH OF ORLEANS
RECORDER OF MORTGAGES**

I, MICHAEL P. McCROSSEN, RECORDER OF MORTGAGES FOR THE PARISH OF ORLEANS, CERTIFY THAT THIS CERTIFICATE HAS BEEN RUN EXCLUSIVELY IN THE EXACT NAMES HEREUNDER SET FORTH AND NOT IN ANY VARIATIONS OF SAID NAMES.

WHERE NO MIDDLE INITIALS HAVE BEEN FURNISHED, IDENTICAL NAMES WITH MIDDLE INITIALS HAVE NOT BEEN RUN AND WILL NOT BE UNLESS SPECIFICALLY REQUESTED.

SUBJECT TO THESE RESTRICTIONS AND EXCEPTIONS, I CERTIFY THAT ACCORDING TO THE RECORDS OF MY OFFICE THERE ARE NO UNCANCELLED ENCUMBRANCES RECORDED IN THE EXACT NAMES HEREINAFTER SET FORTH EXCEPT THE FOLLOWING WHICH BEAR AGAINST THE PROPERTY DESCRIBED HEREUNDER, TO-WIT:

Computer Generated Certificate for Inscriptions
Recorded after September 20, 1987

03/16/95

COMPUTER PAGE: 1

CLERK:JAJ

ORLEANS PARISH RECORDER
 OF MORTGAGES OFFICE
 MICHAEL P. MCCROSSEN,
 RECORDER OF MORTGAGES
 CERTIFICATE GENERATION

REG. NUMBER: 20284 CERT. DATE: 03-15-1995

THIS CERTIFICATE IS GENERATED FOR THE FOLLOWING NAMES INPUT:

FONTAINEBLEAU,
 TULANE HOTEL,
 FIRST FINANCIAL,
 LAST OF NAMES,

88255	FEDERAL TAX LIEN
	FONTAINEBLEAU ORLEANS INC,
2/ 5/1990	SER# 729001699 1/25/90 LPS
	REV - USA \$ 3,894.00

112713	MISCELLANEOUS
	FIRST FINANCIAL BANK,
	F.S.B., ET AL,
10/24/1990	NOTICE TERMINATION OF
	ACTION...RECORD IN FULL
	REV - TULANE HOTEL
	INVESTORS C \$.00
	N.P. - K. O'BRYON - 2798 - 4

260602	MORTGAGE
	TULANE HOTEL INVESTORS
	LIMITED PART, NERSHIP [sic]
4/11/1994	REINSCRIPTION
	REV - ANY PERSON, FIRM
	OR CORPORATION \$ 5,000,000.00
	N.P. - J. F. QUAID - 05 02 1984

TOTAL INSRIPTION THIS SESSION: 3

Renewed and made good

This certificate consists of 2 page(s) #2
 of 2 page(s). 9 A.M. New Orleans, LA
3-10 1995

/s/ John U. Jagot
 Deputy Recorder

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARY ANNA RIVET, MINNA REE CIVIL ACTION
WINER, EDMOND G. MIRANNE, AND
EDMOND G. MIRANNE, JR.

VERSUS NO. 95-0426

REGIONS BANK, WALTER L. BROWN,
JR., PERRY S. BROWN,
AND FOUNTAINBLEAU STORAGE
ASSOCIATES SECTION "A"

ORDER AND REASONS

This matter is before the Court on a Motion to Remand filed by plaintiffs Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne, and Edmond G. Miranne, Jr., and Motions for Summary Judgment filed by defendants Regions Bank, Walter L. Brown, Perry S. Brown, and Fountainbleau Storage Associates ("FSA"). Both motions were set for hearing on April 5, 1995, but were submitted on the briefs. For the reasons stated herein, plaintiffs, Motion to Remand is hereby DENIED and defendants' Motion for Summary Judgment is hereby GRANTED.

I. BACKGROUND

This suit concerns the vitality of a \$5,000,000 collateral mortgage note secured by a collateral mortgage on certain real property located on Tulane Avenue in New Orleans, Louisiana. In 1957, Lois Stern executed a lease on the property in favor of Pelican State Hotel Corporation. The leasehold estate created by the lease was

acquired by Tulane Hotel Investors Limited Partnership ("THILP") on September 15, 1983. On the same date, THILP granted a first mortgage on the leasehold estate to secure a \$15,000,000 collateral mortgage note pledged to First Financial Bank. On May 2, 1984, THILP granted a \$5,000,000 second collateral mortgage (the "Second Mortgage") on the leasehold estate.¹ This Second Mortgage forms the basis of the present dispute.

THILP filed for Chapter 11 bankruptcy on October 5, 1984. The bankruptcy was later converted to a Chapter 7 proceeding and a trustee appointed.² The trustee applied for court approval to sell the leasehold estate at public auction free and clear of all liens including, specifically, the Second Mortgage. The bankruptcy court issued an order advising all creditors and parties in interest of the sale and setting a hearing on any objections for June 16, 1986. At the hearing, plaintiff Edmond G. Miranne, Jr. appeared on behalf of himself and his father, Edmond G. Miranne, Sr., as holders of the Second Mortgage. Their wives, plaintiffs Minna Lee [sic] Winer and Mary Anna Rivet, did not appear. On June 17, 1986, the bankruptcy court granted the sale application and ordered that the

¹ For purposes of brevity, the Court will continue to refer to the "leasehold estate" as the prime subject of this dispute as it is uncontested that the plaintiffs' collateral mortgage burdened the leasehold estate. The Court's disposition of these motions moots defendants' alternate argument that plaintiffs' mortgage was extinguished by confusion, thereby removing any need to address plaintiffs' contention that the mortgage also attached to the buildings on the property as separate immovables.

² See *Matter of Tulane Hotel Investors Limited Partnership*, No. 84-02145-K, (Bankr.E.D.La. December 5, 1985).

sale be free and clear of all liens and encumbrances, including the Second Mortgage.

Pursuant to the bankruptcy court's June 17, 1986 order, the leasehold estate was sold at public auction to the first mortgage holder, First Financial Bank. On August 14, 1986, the bankruptcy court approved the auction results and issued an order directing sale of the property to First Financial Bank "free and clear of any and all liens and encumbrances" and specifically requiring cancellation of the Second Mortgage. Notwithstanding the terms of the bankruptcy court's order, the Second Mortgage was apparently never canceled and remains inscribed on the public records.

Secor Bank eventually succeeded First Financial Bank as owner of the leasehold estate. On December 29, 1993, defendants Walter S. Brown and Perry L. Brown sold the subject property to Secor, making Secor owner of both the property and the leasehold estate. On the same date Secor in turn conveyed its interest to FSA, the current owner.

Plaintiffs filed suit in state court alleging that the December 29, 1993 transactions violated their superior rights under the Second Mortgage. They sought payment of their secured debt and to have the Second Mortgage recognized and maintained against the property, or alternatively, damages. Defendants removed the suit to this Court, citing federal question jurisdiction in that the prior bankruptcy court orders extinguished the Second Mortgage. Plaintiffs filed a motion to remand, arguing that the prior bankruptcy court orders provide defendants with at most an affirmative defense insufficient to confer removal

jurisdiction. Defendants subsequently moved for summary judgment on grounds of *res judicata*, prescription, and confusion.

II. MOTION TO REMAND

The Fifth Circuit recently reiterated the principles governing federal question removal in *Carpenter v. Wichita Falls Independent School District*, 44 F.3d 362 (5th Cir. 1995). Generally, whether a cause of action presents a federal question for removal purposes depends upon the allegations of the plaintiff's well-pleaded complaint. *Id.* at 366. Accordingly, federal rights asserted by way of affirmative defense do not confer removal jurisdiction. However, the "artful pleading" doctrine, an exception to the "well-pleaded complaint" rule, provides that "where the plaintiff necessarily has available no legitimate or viable state cause of action, but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising exclusively under state law." *Id.* In other words, plaintiff cannot avoid removal of a suit necessarily federal in character. *Id.* at 367.

In *Carpenter*, the Fifth Circuit specifically addressed the artful pleading doctrine in the context of *res judicata*, holding that a defendant may properly remove a purported state law cause of action which is "completely precluded by a prior federal judgment on a question of federal law." The Court's explanation is controlling here:

[]Although we recognize that the state courts are able and required to apply federal rules of *res judicata*, the federal law preclusive effect of the federal judgment could arguably be said

to confer a federal character much the way complete preemption does. In both cases, federal law has in some sense extinguished the possibility of a state-court cause of action.

We also point out that the existence of a prior federal judgment lifts the statutory bar against enjoining an ongoing state proceeding. There is little practical distinction between, on the one hand, removing and dismissing a precluded state suit and, on the other hand, enjoining one. Under the relitigation exception to the Anti-Injunction Act, federal courts may enjoin state-court proceedings to protect prior federal judgments.

Id. at 370 (citations omitted and emphasis supplied). Thus under *Carpenter*, the propriety of removal in the present case hinges on whether the federal bankruptcy court's June 17, 1986 and August 14, 1986 orders preclude the plaintiffs' current attempt to enforce their mortgage.

Under the Fifth Circuit's formulation, *res judicata* bars a subsequent claim if: (1) the prior disposition was a final judgment on the merits rendered by a court of competent jurisdiction; (2) the parties are identical; and (3) the causes of action are the same. *Eubanks v. F.D.I.C.*, 977 F.2d 166, 169 (5th Cir. 1992); *Hendrick v. Avent*, 891 F.2d 583, 585 (5th Cir.), cert. denied, 498 U.S. 819 (1990). The present case satisfies all three elements of *res judicata*. It is undisputed that the bankruptcy court's August 14, 1986 Order approving the sale of the leasehold estate to First Financial constituted a final judgment rendered by a competent

court.³ As to the identity of parties element, the Court notes that First Financial Bank was a party to the bankruptcy proceedings. As successors-in-interest to First Financial Bank, Regions Bank and FSA are bound by the bankruptcy court's orders in the same manner as their predecessor. *Meza v. General Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir. 1990). Although plaintiffs Rivet and Winer did not personally appear in the bankruptcy proceedings, the Fifth Circuit has held that a husband's participation in a bankruptcy proceeding binds a wife whose interests are closely aligned with and adequately represented by her husband. *Eubanks v. F.D.I.C.*, 977 F.2d 166 (5th Cir. 1992). Plaintiffs do not even attempt to argue, and indeed it seems wholly implausible, that the Mirannes represented only their own interests at the bankruptcy hearing and not also their wives' interests in preserving and enforcing the Second Mortgage.

Finally, the identity of claims element is satisfied because plaintiffs' claims both in this action and in the bankruptcy proceeding turn on the validity of the Second Mortgage which was determined by the bankruptcy court. Plaintiffs' argument that their cause of action arises solely from the December 29, 1993 transactions ignores

³ Plaintiffs' opposition memorandum asserts at some length various procedural missteps committed by the bankruptcy court in disposing of the leasehold estate, however these arguments are irrelevant as the exclusive mechanism for attacking an improvidently granted bankruptcy order is a timely appeal or request for reconsideration. *Matter of Aguilar*, 861 F.2d 873, 874 (5th Cir. 1988) (citing *Matter of Colley*, 814 F.2d 1008, 1010 (5th Cir.), cert. denied, 484 U.S. 898 (1987).

the fact that all of plaintiffs' claims depend on the existence of a valid and enforceable mortgage. Absent an enforceable mortgage, the December 29, 1993 transactions would not contravene any of plaintiffs' rights and would not be actionable.

Because all three elements of *res judicata* are met, the prior federal bankruptcy court order completely precludes plaintiffs' present cause of action, making removal to federal court proper under *Carpenter*. Plaintiffs argue that any theory of removal jurisdiction based on claim preclusion is necessarily limited by the Supreme Court's decision in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S.Ct. 1684 (1988) to those situations where the specific claims sought to be precluded were "actually litigated" in the prior proceeding. Even assuming that plaintiffs are correct as to the significance of *Chick Kam Choo* in this context, the Court finds that the "actually litigated" requirement was satisfied here. As previously discussed, the central issue underlying plaintiffs' cause of action is the validity of their Second Mortgage as determined by the bankruptcy court. Plaintiffs' charge that defendants fail to put forward any issue that was "actually litigated" in the prior bankruptcy proceeding ignores the whole focus of defendants' various memoranda, namely, that the validity of plaintiffs' Second Mortgage was necessarily decided once and for all as a precursor to authorizing the sale of the leasehold estate free and clear of all liens.⁴

⁴ The Court moreover refuses plaintiffs' invitation to elevate semantics over substance by demanding that defendants employ the totemic words "issue preclusion" rather than the

Finally, plaintiffs' reliance on *D-1 Enterprises, Inc. v. Commercial State Bank*, 864 F.2d 36 (5th Cir. 1989) is misplaced. In *D-1 Enterprises*, the Fifth Circuit refused to apply *res judicata* against counterclaims which were largely unrelated to and which could not have been raised in an earlier summary bankruptcy proceeding. Here on the other hand, plaintiffs' objections to the sale free and clear of their Second Mortgage could have and should have been raised before the bankruptcy court in connection with the trustee's motion to sell. Once the bankruptcy court's orders became final and the property was ordered sold free and clear of plaintiffs' Second Mortgage, all claims relating to the validity of the Second Mortgage were *res judicata*. Removal is thus authorized because the bankruptcy court's orders "extinguished the possibility of a state-court cause of action" to enforce plaintiffs' Second Mortgage. See *Carpenter*, 44 F.3d at 370.

III. MOTIONS FOR SUMMARY JUDGMENT

The Court's holding that the prior federal bankruptcy orders completely preclude plaintiffs' suit to enforce their Second Mortgage necessitates dismissal of plaintiffs' claims against Regions Bank and FSA. The Court's holding also moots plaintiffs' request for further discovery pursuant to Federal Rule of Civil Procedure 56(f), as none of the facts anticipated to be discovered by plaintiffs would mandate an alternate result on the dispositive

traditional and still widely extant term "*res judicata*." See e.g., *U.S. v. Shanbaum*, 10 F.3d 305, 310-14 (5th Cir. 1994).

issue of preclusion. *See Affidavit of John Gregory Odom Pursuant to Rule 56(f).*

The final matter before the Court is the Motion for Summary Judgement filed by defendants Walter L. Brown, Jr. and Perry S. Brown. The basis of plaintiffs' claim is that the Browns "knowing[ly] participa[ted] in the series of transactions by which the Leasehold estate was cancelled [sic] and the separately owned buildings transferred in spite of the mortgage." *See Memorandum in Opposition to Separate Motions for Summary Judgment at 14-15.* However plaintiffs admit at page [sic]⁵ of their opposition memorandum that the Browns did *not* participate in the prior bankruptcy proceedings, and it is therefore difficult to see how the Browns can in any way be held responsible for plaintiffs' loss of rights pursuant to those proceedings. Moreover, plaintiffs themselves characterize their action as one *in rem*, which by definition is a claim against property, not against its former owners. The only case cited by plaintiffs in connection with their claim against the Browns, *In re Big Apple Scenic Studio, Inc.*, 63 B.R. 85 (Bkrtcy. S.D.N.Y. 1986), exhibits no relevance to the present case as it involved a Chapter 7 trustee's action to recover post-petition transfers. Finally, plaintiffs' nebulous allegation that "the Browns are proper parties herein because they are liable to plaintiffs under La. Civ. Code. art. 2315" fails to discharge plaintiffs' burden in opposing summary judgment. Plaintiffs have simply failed to establish any legal basis or any

⁵ *See Memorandum in Opposition to Separate Motions for Summary Judgment at 9.*

triable issue of fact to support a claim against the Browns. Accordingly,

IT IS ORDERED that plaintiffs' motion to remand is hereby DENIED;

IT IS FURTHER ORDERED that the motions for summary judgment filed by defendants Regions Bank, Walter L. Brown, Jr., Perry S. Brown, and FSA are hereby GRANTED.

The Clerk of Court is hereby directed to enter judgment dismissing this suit in accordance herewith.

New Orleans, Louisiana, this 20th day of April, 1995.

/s/ Charles Schwartz, Jr.
UNITED STATES
DISTRICT JUDGE

**Mary Anna RIVET, Minna Ree Winer,
Edmond G. Miranne, and Edmond G.
Miranne, Jr., Plaintiffs-Appellants,**

v.

**REGIONS BANK OF LOUISIANA, F.S.B.,
Walter L. Brown, Jr., Perry S. Brown,
and Fountainbleau Storage Associates,
Defendants-Appellees.**

No. 95-30524.

United States Court of Appeals,

Fifth Circuit.

March 13, 1997.

Holders of second mortgage on Chapter 7 debtor's leasehold estate brought state court action against successors-in-interest of bank that had purchased leasehold at auction and original lessors' successors-in-interest, to enforce their interest in property. Defendants removed case to federal district court, asserting federal question jurisdiction on theory that prior bankruptcy court orders expressly extinguished holders' rights under second mortgage, and moved for summary judgment. Holders sought remand. The United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., 1995 WL 237019, denied motion to remand, and granted summary judgment for defendants. Holders appealed. The Court of Appeals, Wiener, Circuit Judge, held that: (1) case was properly removed pursuant to res judicata artful pleading exception to well pleaded complaint doctrine; (2) prior bankruptcy court orders authorizing and approving sale of leasehold estate free and clear

of encumbrances barred state action as to bank's successors-in-interest; (3) federal district court had supplemental jurisdiction over original lessors' successors-in-interest, who could not assert res judicata; and (4) original lessors' successors-in-interest were not personally liable to holders for loss of second mortgage.

Affirmed.

Edith H. Jones, Circuit Judge, dissented and filed opinion.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JONES and WIENER, Circuit Judges, and FURGESON,* District Judge.

WIENER, Circuit Judge:

Plaintiffs-Appellants Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne, and Edmond G. Miranne, Jr. (collectively, the Mirannes)¹ appeal the district court's order refusing to remand their case to the Louisiana state court from which it had been removed by Defendants-Appellees Regions Bank, Walter L. Brown, Perry S. Brown, and Fountainbleau Storage Associates (FSA) (collectively, the defendants). The Mirannes also appeal the district court's grant of the defendants' motions for summary judgment dismissing that action. Concluding that

* District Judge of the Western District of Texas, sitting by designation.

¹ Edmond G. Miranne and Mary Anna Rivet are husband and wife, and Edmond G. Miranne, Jr. and Minna Ree Winer are husband and wife.

the district court correctly denied remand under the "artful pleading" exception to the well-pleaded complaint doctrine, we affirm the refusal to remand the Mirannes' suit to state court; and, agreeing that summary judgment of dismissal was providently granted on the basis of claim preclusion, we affirm.

I.

FACTS AND PROCEEDINGS

This action concerns the viability of a \$5,000,000 second mortgage on the interest of the lessee (leasehold estate)² in a parcel of immovable property (leased premises) located at the intersection of Tulane and Carrollton Avenues in New Orleans, Louisiana.³ In 1957, Lois Stern as lessor granted a ground lease of the leased premises to Pelican State Hotel Corporation as lessee. As a result of

² "Leasehold estate" is a term unknown to the Civil Law, which does not recognize estates in land. See A.N. Yiannopoulos, 2 *Louisiana Civil Law Treatise* § 226 at 422-23 (3d ed.1991). In Louisiana, a lease of immovable (real) property is a personal (in personam) contract which does not create rights in rem; however, under provisions of various statutes, both predial (real estate) and mineral leases are afforded some of the attributes of rights *in rem*, notably the protection of the public records doctrine, including the susceptibility of the rights of the lessee to conventional (real estate) mortgages and the ranking of such encumbrances among themselves based on time of recordation. See *id.*, at 424-25, and also La.Rev.Stat. Ann. §§ 2721 & 2754-56 (West 1991).

³ The location of the leased premises is a legendary one to many New Orleanians. For years the property was the site of Pelican Stadium, the home field of the old New Orleans Pelicans minor league baseball team.

several subsequent assignments, the leasehold estate was eventually acquired by Tulane Hotel Investors Limited Partnership (THILP) on September 15, 1983. On the same date, THILP granted a collateral mortgage (first mortgage) encumbering the leasehold estate to secure a \$15,000,000 collateral mortgage note, which in turn was pledged as collateral on a loan from First Financial Bank (FFB).⁴ In May of the following year, THILP granted another collateral mortgage (second mortgage) on the leasehold estate, this one to secure a \$5,000,000 collateral mortgage note pledged to and held by the Mirannes.⁵

In 1985, little more than a year after granting the second mortgage, THILP filed for protection under Chapter 11 of the Bankruptcy Code. The bankruptcy was later converted to a Chapter 7 proceeding and a trustee was appointed. In the spring of 1986, the trustee applied for court approval to sell the leasehold estate at public auction, free and clear of essentially all encumbrances, specifically including the second mortgage.⁶ The bankruptcy court issued an order advising all creditors and parties in interest who might oppose the proposed sale to serve any

⁴ See Max Nathan, Jr., *The Collateral Mortgage, Logic and Experience*, 49 La. L.Rev. 39 (1988), for a discussion of the collateral mortgage, that unique Louisiana "hybrid security device, combining the elements of both pledge and mortgage." *Id.* at 39-40.

⁵ One of the holders of the note, Edmond G. Miranne, Jr., also appears to have been a partner of THILP.

⁶ At this point, the leasehold estate consisted principally of the Bayou Plaza Hotel, formerly known as the Fountainbleau Hotel.

objections to the sale on the trustee and file such objections with the court by June 12, 1986. The court also set June 16, 1986 as the date for a hearing on the trustee's application. At the hearing, plaintiff Edmond G. Miranne, Jr., an attorney-at-law, appeared on behalf of himself, pro se, and his father, plaintiff Edmond G. Miranne, as holders of the note secured by the second mortgage. Their respective wives, plaintiffs Minna Ree Winer and Mary Anna Rivet, did not appear in person; neither were they identified by name as being represented by Miranne, Jr.

On the day after the hearing, the bankruptcy court granted the sale application and ordered that the leasehold estate be sold free and clear of virtually all liens and encumbrances, expressly identifying the second mortgage held by the Mirannes as one of the myriad encumbrances to be canceled. As no appeal was taken from that order, the trustee proceeded with the public auction of the leasehold estate. At the auction, FFB, the holder of the first mortgage, submitted the only bid. Approximately two months later, the bankruptcy court approved the auction results, directed that the sale of the leasehold estate to FFB be consummated, and ordered the Recorder of Mortgages for Orleans Parish to cancel the liens and encumbrances listed, which expressly included the second mortgage held by the Mirannes. Despite the bankruptcy court's order, however, the second mortgage was, for some as yet unexplained reason, never canceled and remained inscribed on the public records of Orleans Parish.

Secor Bank eventually succeeded FFB as owner of the leasehold estate. In December 1993, Defendants-

Appellees Walter L. Brown and Perry S. Brown, successors-in-interest to the original lessors, sold the leased premises to Secor, thereby vesting Secor with perfect ownership of the leased premises.⁷ Later the same day, Secor in turn conveyed its newly acquired full ownership in the leased premises to FSA, which remained the record owner as of the commencement of the instant litigation. Secor was thereafter succeeded by Regions.

A year later, the Mirannes filed this suit in Louisiana state court against the defendants, alleging that the December 1993 transactions – in which the Browns conveyed their interest in the leased premises to Secor (which already owned the leasehold estate), and Secor in turn conveyed the leased premises in full ownership to FSA – had the net effect of canceling the lease and thereby abrogating the Mirannes' purported rights under the second mortgage which, they alleged, still encumbered the leasehold estate. The Mirannes sought (1) to have the second mortgage recognized and enforced, via ordinaria, against the immovable property located on the leased premises, or (2) alternatively, damages. In their complaint, the Mirannes assiduously avoided any hint of

⁷ Under Louisiana Civil Code Article 1903, an obligation may be extinguished by "confusion" when the qualities of obligee and obligor are united in the same person. Thus when a lessor's interest and a lessee's interest in the same immovable property are consolidated in the same person, the lease ceases to exist and the person vested with both interests will hold perfect or full ownership – essentially the equivalent of "fee simple" title in the common law. See *Ranson v. Voiron*, 176 La. 718, 146 So. 681, 682 (1931).

the previous bankruptcy proceedings and orders affecting the leased premises, the leasehold estate, and their second mortgage against it.

The defendants removed the case to federal district court, asserting federal question jurisdiction on the theory that the 1986 bankruptcy court orders expressly extinguished the Mirannes' rights under the second mortgage. Following removal, Regions and FSA filed motions for summary judgment asserting, *inter alia*, claim preclusion based on the bankruptcy court's orders. The Browns also filed for summary judgment adopting Regions and FSA's claim preclusion defense and asserting, as a separate and independent basis for dismissal, the Mirannes' failure to state a cause of action against the Browns. More or less simultaneously, the Mirannes sought remand, contending that the bankruptcy court orders at most provided defendants with an affirmative defense and thus could not confer removal jurisdiction. The district court denied the Mirannes' motion to remand, relying primarily on the principles announced by this court in *Carpenter v. Wichita Falls Independent School District*.⁸ At the same time, the court granted summary judgment in favor of FSA and Regions on claim preclusion grounds, and in favor of the Browns on their separate and independent grounds. The Mirannes timely filed a notice of appeal from these rulings.

⁸ 44 F.3d 362 (5th Cir.1995).

II.

ANALYSIS

A. Removal Jurisdiction – Basic Principles

We have recently reviewed the well established principles governing federal question removal jurisdiction.⁹ The denial of a motion to remand an action removed from state to federal court presents a question of federal subject matter jurisdiction and statutory construction which we review *de novo* on appeal.¹⁰ As a defendant's use of the removal statute¹¹ deprives a state court of a case properly before it and thereby implicates concerns of federalism, that statute must be strictly construed.¹² It follows that the defendant who seeks to sustain removal must also bear the burden of establishing federal jurisdiction over the subject matter of the state court suit.¹³

As a general proposition, removal hinges on whether a federal district court could have asserted original jurisdiction over the state court action had it initially been filed in federal court.¹⁴ When a defendant seeks to remove a state court suit on the basis of federal question

⁹ See *id.* at 365-67.

¹⁰ *Garrett v. Commonwealth Mortgage Corp. of America*, 938 F.2d 591, 593 (5th Cir.1991).

¹¹ 28 U.S.C. § 1441.

¹² *Carpenter*, 44 F.3d at 365-66.

¹³ *Id.* at 365.

¹⁴ See 28 U.S.C. § 1441(a).

jurisdiction, as was the case here, removal will be appropriate only if the action is one "arising under the Constitution, laws or treaties of the United States."¹⁵ In most cases, a defendant's assertion of federal question removal jurisdiction will rise or fall on the allegations in the plaintiff's "well-pleaded complaint,"¹⁶ that is, on whether "there appears on the face of the complaint some substantial, disputed question of federal law."¹⁷ This means that the defendant must predicate his assertion of federal jurisdiction on the allegations of the plaintiff's claim, not, for example, on the basis of an anticipated or even an inevitable federal defense.¹⁸ As Justice Cardozo succinctly put it, the defendant must show that a federal right is "an element, and an essential one, of the plaintiff's cause of action."¹⁹

B. Artful Pleading Exception – Federal Res Judicata

Federal courts have over the years created but a few narrow exceptions to the fundamental precept of the well-pleaded complaint doctrine that "[t]he plaintiff is master of her complaint."²⁰ The common rationale for

¹⁵ 28 U.S.C. §§ 1331 & 1441(b).

¹⁶ *Carpenter*, 44 F.3d at 366 (citing *Louisville & Nashville R. Co. v. Motley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908)).

¹⁷ *Carpenter*, 44 F.3d at 366 (citing *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12, 103 S.Ct. 2841, 2848, 77 L.Ed.2d 420 (1983)) (emphasis added).

¹⁸ *Carpenter*, 44 F.3d at 366.

¹⁹ *Gully v. First Nat'l Bank*, 299 U.S. 109, 112, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936).

²⁰ *Carpenter*, 44 F.3d at 366.

these jurisprudential exceptions – euphemistically known by the cynically sarcastic sobriquet of the "artful pleading exception" – is that when a plaintiff has available "no legitimate or viable state cause of action, but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising exclusively under state law."²¹

The first and best known specie of artful pleading is the one that arises when the area of state law upon which a plaintiff's claim is based has been "completely preempted" by federal law; i.e., when the "pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.' "²²

²¹ *Id.* We note that another jurisprudentially created doctrine, more frankly labeled "fraudulent joinder," supports the assertion of removal jurisdiction on the basis of diversity of citizenship when a plaintiff's well-pleaded complaint would not otherwise allow removal because of the joinder of a non-diverse defendant. Even though we give great deference to the allegations found in the plaintiff's state court complaint, we will nevertheless examine the questioned joinder of a non-diverse defendant and hold it to be fraudulent under this doctrine when there is no possibility of recovery against that party. See *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir.1992); *Carriere v. Sears Roebuck and Co.*, 893 F.2d 98, 100 (5th Cir.1990). The parallel between the fraudulent joinder exception and the artful pleading exception should be obvious.

²² *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393, 107 S.Ct. 2425, 2430, 96 L.Ed.2d 318 (1987) (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65, 107 S.Ct. 1542, 1547, 95 L.Ed.2d 55 (1987)).

Only a few types of claims have been held to be "completely pre-empted," though – most notably those pre-empted by Section 302 of the Labor Management Relations Act of 1947 or by Section 502 of the Employment Retirement Income Security Act of 1974.²³

A second and somewhat rarer species of artful pleading that justifies an exception is the one exemplified by the case we consider today, as illustrated in *Federated Department Stores v. Moitie*²⁴ – claim preclusion or res judicata. In *Moitie*, seven plaintiffs had filed and lost a consolidated antitrust suit in federal court.²⁵ Five of the seven plaintiffs appealed the district court decision, but two (Brown and Moitie) elected to file almost identical second suits (*Brown II* and *Moitie II*) in state court, facially based exclusively on state law. After the defendants removed these two state court suits, Brown and Moitie sought remand to state court. The district court first denied Brown's and Moitie's motions to remand, finding that their state court actions "were properly removed to federal court because they raised 'essentially federal law'

²³ See *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n. of Machinists*, 390 U.S. 557, 559, 88 S.Ct. 1235, 1237, 20 L.Ed.2d 126 (1968) (§ 302 of LMRA); *Metropolitan Life*, 481 U.S. at 65-66, 107 S.Ct. at 1547-48 (§ 502 of ERISA).

²⁴ 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981).

²⁵ Six of the plaintiffs had originally filed their suits in federal court, and one plaintiff who originally filed suit in state court saw his action removed to federal court on federal question and diversity jurisdiction grounds. The district court found that all of the plaintiffs had failed to allege an "injury" to their "property or business" within the meaning of § 4 of the Clayton Act, 15 U.S.C. § 15. *Id.* at 395-96.

claims," then dismissed the claims on res judicata grounds.²⁶

In the meantime, the Ninth Circuit had ruled in favor of the other original federal plaintiffs – the five who had appealed their district court losses – based on a supervening Supreme Court decision that had worked a substantive change in pertinent antitrust law. Consequently, when the two state court plaintiffs, Brown and Moitie, appealed the district court's denial of their motions to remand and its subsequent dismissals for res judicata, the Ninth Circuit reversed the district court on the merits of its res judicata determination, but – importantly – only after affirming the district court's assertion of removal jurisdiction and denial of remand.²⁷ The Supreme Court then granted *certiorari* to consider, specifically, the preclusion issues raised by the Ninth Circuit's res judicata analysis.²⁸

Although the Supreme Court's decision was primarily focused on the substantive preclusion issues thus presented, the Court, of necessity, also affirmed the district courts' original assertion of removal jurisdiction over *Brown II* and *Moitie II* and the Ninth Circuit's affirmation of that jurisdiction. In a lengthy footnote, the Court stated:

The Court of Appeals also affirmed the District Court's conclusion that *Brown II* was properly

²⁶ *Id.* at 396-97.

²⁷ *Id.* at 397-98.

²⁸ *Id.* at 398 ("We granted certiorari . . . to consider the validity of the Court of Appeals' novel exception to the doctrine of res judicata.").

removed to federal court, reasoning that the claims presented were "federal in nature." We agree that at least some of the claims had a sufficient federal character to support removal. As one treatise puts it, courts will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and that] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization. 14 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3722, pp. 564-566 (1976) (citing cases) (footnote omitted). The District Court applied that settled principle to the facts of this case. . . . We will not question here that factual finding.²⁹

Regrettably, the Supreme Court did not explain precisely what there was about the plaintiffs' state law claims that was so "federal in nature" as to support removal under the artful pleading exception.

Even though at least one district court and one commentator have suggested that *Moitie* should be disregarded either as an aberration that has never been confirmed by the Supreme Court or as an injudicious application of an already suspect doctrine,³⁰ the circuit courts have nevertheless attempted, as they must, to find

²⁹ *Id.* at 397 n. 2 (emphasis added).

³⁰ See *Magic Chef, Inc. v. Int'l Molders & Allied Workers Union*, 581 F.Supp. 772, 776 n. 4 (E.D. Tenn. 1983) (claiming that *Moitie*'s value as authority regarding removal jurisdiction was superseded by the Supreme Court's opinion in *Franchise Tax Bd.*, which was written by Justice Brennan, a vocal dissenter in *Moitie*, and which does not cite *Moitie* at all); Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 Hastings L.J. 273, 303-315 (1993).

meaning in *Moitie*'s enigmatic footnote. As it happens, different circuits have articulated one or the other of two distinct rationales for the Supreme Court's use of the artful pleading exception in its approval of the district court's denial of remand in *Moitie*.

One rationale was offered in *Travelers Indemnity Co. v. Sarkisian*,³¹ in which the Second Circuit interpreted *Moitie* to permit removal whenever a plaintiff files a complaint based on federal law in federal court and subsequently files an ostensible state law claim in state court containing essentially the same elements. Consistent with the well-pleaded complaint doctrine, this "election of forums" or "consent" rationale recognizes in essence that a plaintiff remains the master of his complaint, but engrafts on this doctrine the limitation that the plaintiff is allowed but one opportunity to characterize his claims.³²

Reasoning that the Second Circuit's "election of forums" rationale would lead to an unwarranted and excessive expansion of federal removal jurisdiction, the Ninth Circuit, in *Sullivan v. First Affiliated Securities, Inc.*,³³ concluded that *Moitie* is better explained as permitting removal of only those subsequent state court claims that are barred by the res judicata effect of a prior federal

³¹ 794 F.2d 754, 760-61 (2nd Cir.), cert. denied, 479 U.S. 885, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986).

³² See Ragazzo, 44 Hastings L.J. at 307-308.

³³ 813 F.2d 1368, 1374-75 (9th Cir.), cert. denied, 484 U.S. 850, 108 S.Ct. 150, 98 L.Ed.2d 106 (1987) (critiquing the election of forums rationale as applied in *Sarkisian* and as discussed in dicta of an earlier Ninth Circuit decision, *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423 (9th Cir. 1984)).

judgment.³⁴ As the Ninth Circuit later put it, a plaintiff's state law claim may be classified as "'artfully pleaded' when it is drafted to avoid stating allegations or claims already resolved by a prior federal judgment."³⁵ In a number of subsequent cases, the Ninth Circuit, as well as other circuits, have endorsed *Sullivan's* articulation of this "federal res judicata" rationale for *Moitie* and have applied *Sullivan's* principles, all the while recognizing that this additional branch of the artful pleading exception must be used sparingly, in the narrow and exceptional circumstances described by *Sullivan* and *Moitie*.³⁶

³⁴ *Id.* at 1376 ("We therefore construe *Moitie* as limited to removal of state claims precluded by the res judicata effect of a federal judgment.").

³⁵ *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1403 (9th Cir.1988); see also *Clinton v. Acequia, Inc.*, 94 F.3d 568, 571 (9th Cir.1996) (stating that Ninth Circuit has consistently "found the artful pleading doctrine to support removal where a plaintiff files his state law claims in state court in an attempt to circumvent the res judicata effect of a prior federal claim that has been reduced to judgment").

³⁶ See e.g., *Ultramar America Limited v. Dwelle*, 900 F.2d 1412, 1415 (9th Cir.1990) (acknowledging that *Sullivan* recognized a new basis for invoking the artful pleading doctrine but noting that recharacterization of a state court claim under the res judicata branch of the doctrine may only occur when prior federal judgment resolved issues of federal not state law); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 912 (7th Cir.1993) (recognizing *Ultramar* distinction but also finding that removal was improper because no res judicata was present); *Ethridge*, 861 F.2d at 1403 (endorsing *Sullivan* but finding that removal was improper because federal court lacked subject matter jurisdiction over complaint in prior and allegedly preclusive federal action); *Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 908 F.2d 477, 480 (9th Cir.1990) (applying *Sullivan* rule but holding that

In *Carpenter v. Wichita Falls Ind. School District*,³⁷ a panel of this court squarely confronted the same interpretive issue presented to the Ninth Circuit by *Sullivan*.³⁸ Explicitly rejecting the Second Circuit's expansive election of forums approach and agreeing with the Ninth Circuit's "narrower interpretation,"³⁹ we concluded in *Carpenter* that the "federal character" of the plaintiffs' claims justifying removal in *Moitie* must be found in the federal law of preclusion.⁴⁰ In so doing we were careful to reiterate our continuing confidence that state courts would comply with their Supremacy Clause obligation to apply federal rules of res judicata.⁴¹

In addition, we emphasized our awareness that defendants in state court suits frequently have the option of employing the relitigation exception to the Anti-

removal was improper because plaintiff's claim had never previously been before a federal court and no res judicata defense was available to defendants).

³⁷ 44 F.3d 362 (5th Cir.1995).

³⁸ In *Carpenter*, the plaintiff, a school administrator, filed two separate suits against the school district she worked for – one in federal court alleging violations of her free speech rights under the First Amendment to the United States Constitution and one in state court stating a state contract claim and a free speech claim exclusively under the Texas Constitution. 44 F.2d at 365. Similarly, *Sullivan* involved a federal action under federal securities law and another similar and simultaneous action in state court under state securities law. 813 F.2d at 1370.

³⁹ *Carpenter*, 44 F.3d at 369 n. 6, 370 n. 12.

⁴⁰ *Id.* at 370.

⁴¹ *Id.*

Injunction Act,⁴² as an alternative approach to disposing of a state court suit that is precluded by a prior federal judgment. The fact that a defendant could seek to enjoin a state court action and thereby, if successful, achieve the same result that he might have obtained had he instead sought to remove and dismiss the suit under *Moitie*, does not, Judge Garwood expressly observed in *Carpenter*, render *Moitie* superfluous. Rather, Judge Garwood went on to explain, the co-extensive nature of the relitigation exception to the Anti-Injunction Act on the one hand and the artful pleading exception to the well-pleaded complaint doctrine – based on *Moitie*'s federal res judicata grounds – on the other hand simply suggests that “any potential impact on federalism from removal [in *Moitie*] was not significant.”⁴³ In thus clearly setting forth the rule for this circuit, the *Carpenter* panel concluded by stating that:

[w]e hold that *Moitie* should apply only where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law.⁴⁴

Returning to the case now before us, we conclude that the district court properly reasoned that *Carpenter's* holding provides the sole framework for analyzing the jurisdictional issues raised by the Mirannes' thinly veiled

⁴² 28 U.S.C. § 2283 (“A court of the United States may not grant an injunction to stay proceedings in a state court except . . . to protect or effectuate its judgments.”) (emphasis added).

⁴³ *Id.*

⁴⁴ *Id.* (emphasis added).

collateral attack on the bankruptcy court's prior orders. The fact that in *Carpenter* the federal res judicata artful pleading rationale did not, in the end, support removal under the specific circumstances of that case – there was no prior federal case and no prior federal judgment, just two simultaneously filed suits, one based on federal law and one scrupulously – “artfully” – based solely on state law – does not, as the Mirannes now contend, render Judge Garwood's carefully articulated holding in *Carpenter* dicta. To the contrary, and just as the district court here found, *Carpenter* controls. Accordingly, if the defendants can show that the Mirannes' state court suit, purportedly brought to enforce their erstwhile second mortgage, is in fact barred by the claim preclusive effects of the bankruptcy court's 1986 orders that authorized and approved the sale of the leasehold estate free and clear of that mortgage and mandated its cancellation, then the district court's denial of the Mirannes' motion to remand, and its dismissal of their suit for essentially the same reason, must be affirmed.

C. The Bankruptcy Court's 1986 Orders Bar the Mirannes' Present Suit

Under the “pure” res judicata or claim preclusion rubric as developed in this circuit, a prior judgment will operate to preclude a later filed suit if four elements are present: (1) The parties in the later action are identical to, or at least in privity with, the parties in the prior action; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action concluded with a final judgment on the merits; and (4) the

same claim or cause of action is involved in both actions.⁴⁵ As we find beyond peradventure that all four elements subsist in the instant case, we conclude, just as did the district court, that the claims presented by the Mirannes' subsequent state court action, ostensibly seeking to enforce their second mortgage, are in fact precluded by the bankruptcy court's 1986 orders.

1. Identity and Privity of the Parties

The bankruptcy court's order authorizing the sale of the leasehold estate reflects that Edmond G. Miranne Jr., an attorney-at-law, appeared in court on the previous day, both pro se and as counsel for his father, in connection with the pending sale application by the trustee. The fact that the Mirannes' wives, Rivet and Winer,⁴⁶ did not personally appear and were not expressly identified by Miranne Jr. as parties that he represented, is of no significance. We have previously held that one individual's participation in a bankruptcy proceeding may bind a non-party, such as a spouse, whose interests are closely aligned with and adequately represented by the person who did appear.⁴⁷ Here, Rivet and Winer had interests identical to those of their husbands in the bankruptcy proceeding – namely the preservation (more accurately

⁴⁵ *United States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir.1994).

⁴⁶ In Louisiana, married women are entitled to retain and use their maiden names, and frequently do so in legal documents, such as deeds, mortgages, and pleadings, especially in New Orleans and the "country parishes" of South Louisiana. See La. Civ.Code art. 100.

⁴⁷ *Eubanks v. F.D.I.C.*, 977 F.2d 166, 170 (5th Cir.1992).

here, the resurrection) and protection of the second mortgage. In fact, their subsequent state court complaint listed only the husbands as owners of the collateral mortgage note, even though it was presumptively community property under Louisiana law.⁴⁸ Consequently, the husbands' participation in the 1986 bankruptcy proceedings by way of Edmond G. Miranne, Jr.'s appearance at the sale application hearing served as adequate representation of the interests of the spouses in community and was thus no less binding on the wives for claim preclusion purposes than it was on their husbands.⁴⁹

With respect to the defendants, there is no dispute that FFB was a party to the bankruptcy proceedings as holder of the first mortgage and the eventual purchaser of the leasehold estate at the public auction. Neither is there doubt that Regions and FSA are successors-in-interest to FFB with respect to the property affected by the

⁴⁸ See La. Civ.Code art. 2340 ("Things in possession of a spouse during the existence of a regime of community of acquests and gains are presumed to be community, but either spouse may prove that they are separate property.").

⁴⁹ Under Louisiana's community property laws, the rule of equal management generally applies to community property; however, the concurrence of both spouses is required for the alienation, encumbrance or lease of community immovables and in other limited situations specified by law. La. Civ.Code arts. 2346-47. As the collateral mortgage note held by the Mirannes is classified as an "incorporeal movable," concurrence of the Mirannes' spouses would not have been required for the husbands to alienate whatever rights flowed from their ownership of the note and the mortgage securing it. See Nathan, 49 La. L.Rev. at 44.

bankruptcy court orders. Again, the rule is well established that a judgment may have claim preclusive effect on a non-party if the non-party is a successor-in-interest to a party's interest in property affected by the judgment.⁵⁰ Consequently, both Regions and FSA are bound by the bankruptcy court's orders to the same extent as is their predecessor, First Financial. Accordingly, we conclude that the first element of claim preclusion is clearly satisfied in this case with respect to all four plaintiffs and to defendants Regions and FSA.⁵¹

2. A Court of Competent Jurisdiction and A Final Judgment

The second and third claim preclusion elements are also present in the instant case. As a general proposition, district courts have jurisdiction over cases or civil proceedings arising under Title 11, or arising in or related to cases under Title 11.⁵² It follows that a district court has jurisdiction to authorize and approve a trustee's sale.⁵³

⁵⁰ *Meza v. General Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir.1990); *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 188 (5th Cir.1990).

⁵¹ We acknowledge that this first condition of claim preclusion cannot be satisfied with respect to the Browns, but we dispose of the jurisdictional wrinkle raised by this fact below. See *infra* Part E.

⁵² 28 U.S.C. § 1334(a),(b).

⁵³ *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 870 (5th Cir.1984); *In re Heine*, 141 B.R. 185, 187 (Bank.D.S.D.1992); see also *Matter of Baudoin*, 981 F.2d 736, 740 (5th Cir.1993) (recognizing wide reach of jurisdiction under Title 11).

Indeed, a proceeding to sell property free and clear of liens pursuant to 11 U.S.C. § 363(b) and (f) is a core proceeding in which the bankruptcy court has jurisdiction to issue final orders and judgments.⁵⁴ Here the proposed sale of the leasehold interest arose under and was related to THILP's chapter 7 bankruptcy case. Consequently, the bankruptcy court had jurisdiction to consider the Trustee's sale application and to issue the ensuing orders (1) authorizing the sale of the leasehold estate free and clear of specified junior liens, expressly including the second mortgage held by the Mirannes, and (2) approving that sale and directing the cancellation of those specified inferior encumbrances.

Although they characterize the bankruptcy court's sale orders as actions beyond the "power" of the bankruptcy court under the rules and provisions of the Bankruptcy Code,⁵⁵ the Mirannes' authority for this proposition does not comport with Congress' jurisdictional grant to the district court – and its adjunct, the bankruptcy court – to determine whether property of a debtor should be sold free and clear of liens and encumbrances. The Mirannes, of course, were entitled to question whether the bankruptcy court properly exercised the powers granted to it by 11 U.S.C. § 363 in the

⁵⁴ 28 U.S.C. § 157(a),(b)(2)(N); *Heine*, 141 B.R. at 188.

⁵⁵ Appellants principally contend that the bankruptcy court order extinguishing the second mortgage was invalid because the order did not result from an adversary proceeding as required by Fed. R. Bank. Proc. 7001 and because the court did not satisfy the provisions of § 363(f)(1)-(5).

particular circumstances of this case. This kind of substantive – but *not* jurisdictional – objection to a bankruptcy court's orders, however, is one that had to have been timely raised either in an appeal or a motion for reconsideration, not eight years after the fact in a state court collateral attack on those orders. We reject out of hand the Mirannes' specious contention that, for claim preclusion purposes, the bankruptcy court lacked jurisdiction to issue the 1986 sale orders.

In addition, an order by a bankruptcy court authorizing or approving the sale of an asset of the bankrupt estate is a final judgment on the merits for res judicata purposes even if the order neither closes the bankruptcy case nor disposes of any claim.⁵⁶ Therefore, there can be no serious question that the bankruptcy court's 1986 orders authorizing and approving the sale of the leasehold estate free and clear of essentially all liens and encumbrances were final judgments capable of precluding the Mirannes' later filed state court collateral attack. It is equally beyond serious question that these final judgments affected issues of federal law: Bankruptcy is a quintessential federal question.

3. The Same Cause of Action

In conducting our search for the presence of the fourth element required for the applicability of claim preclusion, we employ the transactional test of Section 24

⁵⁶ *Matter of Baudois*, 981 F.2d at 742; *Hendrick v. Avent*, 891 F.2d 583, 586 (5th Cir.), cert. denied, 498 U.S. 819, 111 S.Ct. 64, 112 L.Ed.2d 39 (1990); *Southmark Properties*, 742 F.2d at 870.

of the *Restatement (Second) of Judgments* to determine whether the two suits in question involve the same claim for purposes of claim preclusion.⁵⁷ Under the "same claim" inquiry, the critical issue is whether the two actions under consideration are based on the *same nucleus of operative facts*.⁵⁸

In the instant case, we find that both the bankruptcy court's 1986 orders authorizing and approving the sale of the leasehold estate free and clear of the Mirannes' second mortgage and the Mirannes' claims in their state court action are unquestionably based on, and in fact are entirely dependent on, the same nucleus of operative facts – namely, the viability, the validity, the enforceability of the second mortgage. In "artfully" contending that their putative state cause of action arises solely out of the December 1993 transaction involving the Browns, Secor and FSA, the Mirannes studiously ignore the fact their claim relative to that 1993 transfer can go absolutely nowhere unless they can establish that their second mortgage was alive and well at that time, despite the 1986 bankruptcy court orders that expressly authorized and approved the sale of the leasehold estate free and clear of that mortgage and directed that it be canceled from the mortgage records of Orleans Parish.

Without an extant enforceable mortgage, the Mirannes cannot forthrightly plead either a right of action or a cause of action in state court. Indeed, all of the acts of

⁵⁷ *Matter of Baudois*, 981 F.2d at 743; *Southmark Properties*, 742 F.2d at 870-71.

⁵⁸ *Matter of Baudois*, 981 F.2d at 743.

alleged wrongdoing in the December 1993 transaction are so inextricably intertwined with and dependent on the 1986 bankruptcy orders directing and approving the sale of the leasehold estate free and clear of the second mortgage that we would be hard pressed to conjure up a better hypothetical example of two actions arising from the same nucleus of operative facts. In this regard we remain ever mindful of the basic canon of Louisiana law that the public records do not create rights; the existence of the uncanceled *inscription* of the second mortgage on the public records could not keep the mortgage itself legally viable after the obligation it secured – the collateral mortgage note – as well as the mortgage, were terminated in the bankruptcy of the maker/mortgagor, THILP.

A review of relevant case law applying *res judicata* principles in the bankruptcy context further confirms our analysis. On one hand, our decisions have consistently held that under the transactional test a final bankruptcy court *sale* bars any subsequent claims that challenge the finality or integrity of the transfer of title pursuant to that sale.⁵⁹ On the other hand, the Mirannes' reliance on *D-1 Enterprises, Inc. v. Commercial State Bank*,⁶⁰ a case in which we held that *res judicata* does not apply to claims that

⁵⁹ See *Southmark Properties*, 742 F.2d at 870-72 (debtor's later filed lender liability action barred by bankruptcy court's order authorizing sale of property in debtor's estate "free and clear of all . . . claims" to secured creditor as both involved "common nucleus of operative facts"); *Hendrick*, 891 F.2d at 587 (trustee's actions under RICO and securities laws barred by bankruptcy court's sale order authorizing transfer of title of stock against which trustee had launched his collateral action).

⁶⁰ 864 F.2d 36 (5th Cir.1989).

were largely unrelated to and which could not have been raised in an earlier bankruptcy proceeding, is inapposite to the instant case. Unlike the situation in *D-1 Enterprises*, here the Mirannes had far more than a mere opportunity to object to the sale of the leasehold estate in the bankruptcy court: They were invited by the court to file their objections; they actually appeared in court at the hearing scheduled for the airing of such objections; and once the court issued its sale order, they could have timely filed either a motion for reconsideration – or a notice of appeal – but they did neither. Given their personal attendance, together with these multiple waived or forfeited opportunities to raise and litigate their objections (if any) to the sale, the Mirannes cannot now contend – at least not with a straight face – as did the debtor in *D-1 Enterprises*,⁶¹ that claim preclusion should not be applied because their claim could not have been effectively litigated in the earlier proceeding.

Indisputably, all requisites of claim preclusion are present here, vis-à-vis Regions and FSA. As to these two defendants, therefore, we affirm the district court's refusal to remand the Mirannes' previously removed action under the artful pleading exception to the well-pleaded complaint doctrine.

⁶¹ In *D-1 Enterprises*, we found that the lender liability claims that debtor sought to assert in the later action were not "direct defenses" that the debtor could or should have litigated in response to the creditor's earlier motion for relief from stay. *Id.* at 39. Furthermore, *D-1 Enterprises* also distinguished *Southmark* in which preclusion was appropriate in the context of a "court-ordered public cash auction." *Id.*

D. The “Actually Litigated” Standard

As we noted above, and as this court previously observed in *Carpenter*, the relitigation exception to the Anti-Injunction Act provides another, entirely independent mechanism which defendants (and the federal courts) may use to protect prior federal court judgments.⁶² In *Carpenter* we reasoned that, as the relitigation exception to the Anti-Injunction Act had “already realigned federal-state relations in favor of the federal courts,” Moitie’s use of the res judicata branch of the artful pleading exception signified nothing more than that “any potential impact on federalism from removal was not significant.”⁶³ Thus two lessons are to be gleaned from *Carpenter*: (1) Issues of federalism are not implicated in this context; and (2) the relitigation exception to the Anti-Injunction Act – a route that parallels (but is not identical to) removal via the res judicata iteration of the artful pleading exception – is not the exclusive path available for squelching precluded sequential state court litigation of claims previously litigated in federal court.

Nevertheless, in reliance on the above-quoted limited discussion of how the Anti-Injunction Act co-exists with the federal res judicata interpretation of Moitie, the Mirannes imaginatively contend that the court in *Carpenter* implicitly incorporated the specific restraints of the relitigation exception into its res judicata artful pleading exception based on Moitie. In particular, they contend that removal under *Carpenter* is somehow limited by the

⁶² See *supra* Part B, and 44 F.3d at 370.

⁶³ *Id.*

anti-injunction holding in *Chick Kam Choo v. Exxon Corp.*⁶⁴ The Mirannes argue that *Chick Kam Choo* stands for the proposition that injunctions may be issued under the relitigation exception to § 2283 only with respect to issues that were “actually litigated” in the prior proceeding – that is, only in circumstances in which issue – but not claim – preclusion would apply in a successive proceeding; and that such a limitation must per force restrict the artful pleading exception to issue preclusion. This stretch by the Mirannes, in attempting to incorporate an “actually litigated” restriction into *Carpenter*, is fatally flawed, however.

First, we note that nowhere in *Carpenter* did we even mention, much less impose, an “actually litigated” standard for removal under the res judicata branch of the artful pleading exception; neither did we so much as refer to *Chick Kam Choo*, much less cite it as authority. Second, we are aware of no other court that, when applying the federal res judicata manifestation of the artful pleading exception following *Sullivan*, has seen fit to apply – or even mention – this standard.

But even if we assume, solely for the sake of argument, that an “actually litigated” requirement was imported through *Carpenter*, we would still find that removal is proper under the circumstances of this case. In *Chick Kam Choo*, the Supreme Court, relying on *Atlantic Coast Line R. Co. v. Tidewater Engineers*,⁶⁵ stressed that:

⁶⁴ 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988).

⁶⁵ 398 U.S. 281, 286-287, 90 S.Ct. 1739, 1742-43, 26 L.Ed.2d 234 (1970).

an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings *actually have been decided* by the federal court. Moreover, Atlantic Coast Line illustrates that this prerequisite is strict and narrow. The court assessed the precise state of the record and what the earlier federal order *actually said*; it did not permit the District Court to render a post hoc judgment as to what the order was *intended* to say.⁶⁶

For the bankruptcy court in the instant case to authorize and approve the sale of the leasehold estate free and clear of essentially all liens and encumbrances, that court necessarily had to *decide* whether the Mirannes' inferior second mortgage could survive as an encumbrance against the leasehold estate after that estate was sold at public auction by the THILP trustee's foreclosure on the superior first mortgage. Indeed, the bankruptcy court's order authorizing sale of the leasehold estate "*actually said*," *inter alia*, that (1) Edmond G. Miranne, Jr. appeared on his and his father's behalf, (2) all creditors were given notice and an opportunity to object and be heard, and (3) the sale of the leasehold estate would be free and clear of "all . . . liens, mortgages and encumbrances," including, specifically, the Mirannes' second mortgage. Given *Chick Kam Choo's* admonition to focus on "what the earlier federal order *actually said*," not what "the order *intended to say*" (albeit likely the same thing in this case), it is

⁶⁶ *Chick Kam Choo*, 486 U.S. at 148, 108 S.Ct. at 1690-91 (emphasis in original).

indisputable that in the 1986 bankruptcy court proceedings the continuing validity of the Mirannes' inferior mortgage was "actually litigated and decided."⁶⁷

E. Response to Dissent

Although our colleague, Judge Jones, in her thoughtful dissent agrees with our essential holding that *Moitie* permits removal of state court claims that are barred by the preclusive res judicata effect of a prior federal judgment, she would further limit application of *Moitie's* res judicata removal avenue to cases in which (1) "the prior judgment . . . involved a claim *made* under federal law," and (2) "the claim being removed represented a plaintiff's attempt to seek relief in state court by recharacterizing an 'essentially federal' claim they [sic] had *unsuccessfully pursued first in federal court*."⁶⁸ We acknowledge the overarching federalism concerns that inform Judge Jones' critique, but we nevertheless find her additional suggested restrictions to our already narrow holdings in *Carpenter* and in the instant case to be unwarranted. First, the Ninth Circuit decision that Judge Jones cites in support of her additional restrictions, *Ultramar America Limited v. Dwelle*,⁶⁹ limits *Moitie* recharacterization (i.e., removal) to situations "when the prior federal judgment *resolved* questions of federal law," or "when the prior federal judgment *sounded* in federal law."⁷⁰ It does not, as far as

⁶⁷ *Id.* at 149, 108 S.Ct. at 1691.

⁶⁸ Dissent, *infra*, at 2358 (emphasis added).

⁶⁹ 900 F.2d 1412 (9th Cir.1990).

⁷⁰ *Id.* at 1415-16 (emphasis added).

we can discern, purport to constrain *Moitie* removal to instances in which the *prior federal judgment* arose out of a case that a plaintiff himself had first brought in federal court. True, that is what happened in *Moitie* and that may prove to be the most common circumstance in which *Moitie* removal will occur. But *Moitie's* sanctioning of removal, as we explained in *Carpenter*⁷¹ and as the Ninth Circuit has suggested,⁷² hinges on the *preclusive effects* of a *prior federal judgment* and a state court litigant's attempts to circumvent them artfully, *not* on the manner in which the case giving rise to the preclusive federal judgment reached federal court in the first place.

Indeed, we emphasize that the reasons Judge Garwood found in *Carpenter* that *Moitie* did not apply to the facts before his panel there were (1) there was no prior federal judgment to protect, (2) there was no federal preclusion law to apply, and (3) the plaintiff in *Carpenter*, unlike the plaintiffs in *Moitie*, was "taking preclusion risks in order to have her state law claim heard in its

⁷¹ 44 F.3d at 370 ("If there was any federal character at all to the plaintiffs' state law claims in *Moitie*, it must be the federal law of preclusion.")

⁷² In *Ultramar*, the Ninth Circuit observed that:

The *Moitie* doctrine seems based on a court divining a litigant's motives for bringing suit. When a litigant suffered a final defeat on a federal claim yet thereafter files a similar-although-not-preempted state claim in state court, the sequence of events gives rise to an inference that the litigant is not interested in the state cause of action *per se*, but is instead attempting to circumvent the effects of the federal question judgment. In this limited instance, removal is allowed.

900 F.2d at 1417 (emphasis added).

preferred forum" and thus was "not attempting to avoid the effect of a prior judgment."⁷³ As we have strived to make clear in this opinion, however, in this case we do have a prior federal judgment, we do have federal preclusion law to apply, and we have plaintiffs who have not taken any preclusion risks, but, to the contrary, are clearly seeking by collateral attack to avoid the preclusive effect of a prior federal judgment, long since in repose, that concluded a case in which these plaintiffs had ample opportunity to assert their interests and in fact did assert them. It follows, then, that removal of the plaintiffs' state court collateral attack on the bankruptcy court's final judgment is entirely appropriate in this case, even though the preclusive – and thus essentially federal – nature of that federal court judgment derived from the underlying bankruptcy case. Here, the plaintiffs were interested creditors who were invited to assert their rights based on their second mortgage; there simply was no lawsuit initially filed by these plaintiffs in federal court. Therefore, in spite of Judge Jones' objections, we remain firmly convinced that the Mirannes are not entitled to have their faux foreclosure suit remanded to state court under the well-pleaded complaint doctrine. To do so would make a mockery of that doctrine; the very kind of untoward result that the artful pleading exception – like the fraudulent joinder doctrine – is designed to prevent.

⁷³ *Carpenter*, 44 F.3d at 371.

F. The Final Removal Twist – Supplemental Jurisdiction Over the Mirannes' Claims Against the Browns

To complete our analysis of the jurisdictional questions presented by this case, we address one final, relatively minor issue. The Mirannes insist that, even if the district court properly asserted removal jurisdiction as to Regions and FSA and properly denied remand as to those two defendants under the *Moitie/Carpenter* res judicata artful pleading exception, that court still could not exercise removal jurisdiction over the Mirannes' claims against the Browns. This is so, they urge, because the Browns were not parties to the 1986 bankruptcy proceedings that underlie the preclusion of the Mirannes' subsequent state court suit against FSA and Regions. We disagree. Although we do agree that the *Moitie/Carpenter* rationale is inapplicable to the Browns, the district court – having properly exercised *removal* jurisdiction as to the Mirannes' claims against Regions and FSA – could therefore exercise *supplemental* jurisdiction over the Mirannes' claims against the Browns. These claims clearly formed part of the "same case or controversy" as those against Regions and FSA.⁷⁴ Indeed, we have so found in a similar case involving the complete preemption branch of the artful pleading exception.⁷⁵

⁷⁴ See 28 U.S.C. § 1367.

⁷⁵ See *Kramer v. Smith Barney*, 80 F.3d 1080, 1086 & 1083 n. 1 (5th Cir.1996) (observing that if plaintiff's state law fiduciary duty claims relating to ERISA governed pension accounts were removable under complete preemption theory, plaintiff's other related, non-ERISA, state law claims were removable as supplemental claims under § 1367).

Accordingly, we hold that the district court did not err in asserting jurisdiction over each defendant named in the Mirannes' state court complaint, including the Browns. Neither did that court err in refusing to remand any of those claims to state court.

G. Motions for Summary Judgment

In the foregoing analysis, we determined that the Mirannes' removed state court suit, "artfully" styled as an action to enforce the second mortgage, was in truth nothing but a transparent, "second bite" collateral attack on the bankruptcy court's 1986 orders. It was a blatant attempt at a "gotcha," grounded exclusively in the purely fortuitous and inadvertent failure of some person or persons unknown to follow-up on the court ordered cancellation of the second mortgage from the public records. As a result, we concluded that the well-pleaded complaint doctrine did not immunize that second suit from removal.

In like manner, we now hold that the district court properly granted summary judgment in favor of Regions and FSA on the basis of claim preclusion. Despite its intentionally deceitful garb, the core issue of the Mirannes' subsequent state court complaint was the efficacy of the final, executory, non-appealable orders of the bankruptcy court that had freed the leased premises from, *inter alia*, the Mirannes' second mortgage. As that issue was and remains res judicata, we affirm the district court's summary judgment in favor of Regions and FSA.

We also affirm the district court's grant of summary judgment in favor of the Browns albeit we do so on the

separate and independent ground that the Mirannes failed to establish any legal basis or triable issue of fact to support a claim against the Browns. As the district court observed, the Mirannes first acknowledged that the Browns did not participate in the prior bankruptcy proceedings, thereby casting doubt on whether the Browns could be held responsible for the Mirannes' loss of rights as a result of those proceedings. In addition, the Mirannes also characterized their action as one *in rem*, i.e., a claim to a right in the property, not one *in personam* against its *former* owners, thus precluding any personal liability on the Browns' part.⁷⁶ In sum, as the Browns had no contractual relationship at all with the Mirannes and had long since ceased to have any interest in the property which the Mirannes doggedly contend is still encumbered by their second mortgage, the Browns can have no personal liability to the Mirannes whatsoever. The district court properly granted the Browns' motion for summary judgment.

III CONCLUSION

As should now be apparent from the foregoing analysis, we conclude that the district court correctly held

⁷⁶ See *Louisiana Nat. Bank of Baton Rouge v. O'Brien*, 439 So.2d 552, 556-58 (La.Ct.App. 1st Cir.1983), *writ denied*, 443 So.2d 590 (La.1983) (holding that note marked "in rem" gave maker no liability at all beyond property itself and that creditor was unable to maintain any action against maker to reach any of maker's other assets).

that the Mirannes are not entitled to have their previously removed state court suit remanded to state court under the well-pleaded complaint doctrine. The claim preclusion or res judicata branch of the artful pleading exception to that doctrine demonstrates beyond cavil that their state court suit, filed subsequent to the final judgments of the bankruptcy court on issues of federal law, need not be remanded. For essentially the same reasons, our de novo review of the district court's summary judgment dismissal of the Mirannes' claims against Regions and FSA satisfies us that the Mirannes' subsequent state court action, as removed to federal district court, is barred by res judicata. In like manner the court's exercise of supplemental jurisdiction over the claims against the Browns, and its dismissal of those claims, were not erroneous. Therefore, the district court's orders and judgment from which the Mirannes appeal are, in all respects,

AFFIRMED.

EDITH H. JONES, Circuit Judge, dissenting:

My brethren, conscientiously attempting to follow the guidance of *dicta* in a Fifth Circuit case¹ and a mystifying footnote by the Supreme Court,² have concluded that the federal district court possessed removal jurisdiction over a state court claim principally seeking foreclosure of a second mortgage. Were it not for the ambiguities in the two preceding cases, *Carpenter* and

¹ *Carpenter v. Wichita Falls Independent School Dist.*, 44 F.3d 362 (5th Cir.1995).

² *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981).

Moitie, this result would fly in the face of the well-pleaded complaint limit on removal jurisdiction. I respectfully dissent because I believe the majority's unusual result is not compelled by the authorities. Briefly, *Moitie* means less than the majority asserts, and the *Carpenter dicta* explaining *Moitie* do not require the result here reached. I fear that the majority's result further confuses an already complex byway of federal jurisdiction.

Without repeating the majority's analysis, I agree in part with their holding that – until the Supreme Court clarifies *Moitie* – *Moitie* is "better explained as permitting removal of only those subsequent state court claims that are barred by the res judicata effect of a prior federal judgment." Critically, I would add that the prior judgment should have involved a claim made under federal law. *Ultramar America Limited v. Dwelle*, 900 F.2d 1412, 1415 (9th Cir.1990).³ I would also emphasize that *Moitie* permitted removal only where the claim being removed represented a plaintiff's attempt to seek relief in state court by recharacterizing an "essentially federal" claim

³ The majority argues that the *Ultramar* decision does not "purport to constrain *Moitie* removal to instances in which the prior federal judgment arose out of a case that a plaintiff himself had first brought in federal court." Maj. Op. at 2355 (emphasis in original). However, *Ultramar* did involve a plaintiff who had asserted a prior claim, and the majority has cited no case where *Moitie* removal has been allowed where the plaintiff had not brought a prior suit grounded in federal law. The majority implicitly acknowledges that while it is not "constrain[ed]" from allowing *Moitie* removal where the plaintiff has not brought a prior claim, it is broadening the scope of *Moitie* removal beyond what has been allowed in other circuits.

that they had unsuccessfully pursued first in federal court. *Moitie* thus is a species of the artful pleading doctrine, a doctrine that permits a federal court to pierce the pleadings of a complaint which, although cloaked in terms of state law, actually falls within federal jurisdiction because of the applicability of federal principles. *Moitie*, 452 U.S. at 398, n. 2, 101 S.Ct. at 2427, n. 2. While the circuit courts have split in interpreting *Moitie*,⁴ this narrow understanding is accepted by the majority here and the Fifth Circuit and is well-grounded.⁵

⁴ Compare *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754 (2d Cir.1986) (using plaintiff's choice of forum analysis to apply *Moitie*) and *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368 (9th Cir.1987) (using res judicata analysis).

⁵ The Supreme Court's statement in *Moitie* that "at least some of the claims had a sufficient character to support removal" should be interpreted in light of the authority and examples cited in support of that proposition. 452 U.S. at 397, n. 2, 101 S.Ct. at 2427, n. 2. After citing Professor Wright's treatise for the proposition that federal courts may determine the "real nature" of a plaintiff's claim, the Court cited three cases in which courts did just that. Two were antitrust cases in which plaintiffs had pleaded antitrust claims under a South Carolina statute and the South Carolina courts had held that the statute only applied to conduct in *intrastate* commerce, while the defendants' challenged conduct actually involved *interstate* commerce. See *In re: Wiring Device Antitrust Litigation*, 498 F.Supp. 79, 82-83 (E.D.N.Y.1980) and *Three J Farms, Inc. v. Alton Box Board Company*, 1979 - 1 Trade Cases ¶ 62,423, 1978 WL 1459 (D.S.C.1978), *rev'd on other grounds*, 609 F.2d 112 (4th Cir.1979), *cert. denied*, 445 U.S. 911, 100 S.Ct. 1090, 63 L.Ed.2d 327 (1980). In the third case, the plaintiff filed only state conspiracy claims, but the district court held that the claims implicated federal antitrust laws and labor issues governed by the Labor Management Relations Act. See *Prospect Dairy, Inc. v. Dellwood Dairy Co.*, 237 F.Supp. 176, 178-79 (N.D.N.Y.1964).

But accepting this explanation of *Moitie*, that case cannot confer federal jurisdiction here, because the plaintiffs have no "essentially federal" claim to recharacterize. Their claim rests on purported rights under a second mortgage and on transfers of property interests that allegedly abrogated those rights. This is a state law claim. The only federal element that plaintiffs could have pleaded is an anticipatory defense based upon the prior bankruptcy proceeding. To fall within footnote 2 of *Moitie*, the subsequent state claim must be "merely the same . . . claim in disguise." *Salveson v. Western States Bankcard Ass'n.*, 731 F.2d 1423, 1427 (9th Cir.1984) (characterizing lower court's finding in *Moitie*). The plaintiffs here are not recharacterizing any federal claim. Instead, the second mortgage they seek to enforce was never expunged from the local deed records after a bankruptcy court judgment commanded sale free and clear of all liens and encumbrances. Moreover, the plaintiffs are suing a successor in interest to the bankruptcy sale, not simply the original party to the proceeding in bankruptcy court. Also unlike *Moitie*, the plaintiffs here were not unsuccessful plaintiffs in the prior bankruptcy proceeding, but were defendants there. In every respect, these characteristics represent a more complex procedural scenario than did the *Moitie* plaintiff's copycat pleadings in federal and then state court.

Given my druthers, I would hold that the instant case is distinguishable from a narrow reading of *Moitie*. If, however, *Moitie* compels the result reached by the majority, then it appears significantly to have intruded into previously well-settled removal jurisprudence, whose anchor is the well-pleaded complaint rule. Consider this

hypothetical: A sues B in federal court on a federal securities claim and wins a judgment. B then sues A in state court on a contract claim that was arguably a compulsory counterclaim in the preceding litigation. Following *Moitie* as interpreted by *Rivet*, does the federal court have removal jurisdiction? If so, hasn't *Rivet* moved the boundaries of removal jurisdiction far away from *Moitie*'s self-description as an "artful pleading" case?

The majority relies heavily on Judge Garwood's description of *Moitie* in the *Carpenter* decision. Notwithstanding *Carpenter*'s statement that "we hold that *Moitie* should apply only where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law," 44 F.3d at 370 (emphasis added), *Carpenter*'s statement is more *dicta* than holding. *Carpenter* was a very different case from *Moitie*. The defendants in *Carpenter* sought to rely on *Moitie* to prevent simultaneous litigation by a plaintiff in federal and state courts over the same grievance. Judge Garwood's extended, scholarly discussion of *Moitie* refused to adopt the proffered broad interpretation of *Moitie* that arguably would have prevented parallel litigation. As Judge Garwood put it, "whatever *Moitie* does mean, we are confident it does not mean so much." 44 F.3d at 368. The bulk of *Carpenter*'s discussion explains why some circuit court cases have incorrectly construed *Moitie* to govern parallel litigation.⁶ The *Carpenter* panel was not faced with anything like a plaintiff whose suit was in fact "completely precluded by a prior federal judgment on a question of

⁶ See 44 F.3d at 368-70, n. 6, n. 12 (disagreeing with the second circuit decision in *Travelers*, *supra*, n. 3)

federal law." This "holding" was merely a way to distinguish the cryptic *Moitie* footnote without "empty[ing] footnote 2 of all substantive content," and was surely not meant to broaden the *Moitie* decision's fleeting reference to the "federal character" of the plaintiff's claims into a completely new exception to the well-pleaded complaint rule. *See id.* at 370, n. 11.

In attempting to demonstrate that the factors relied upon by Judge Garwood in *Carpenter* to allow remand are not present here, the majority contends that "in this case we do have a prior federal judgment, we do have federal preclusion law to apply, and we have plaintiffs who have not taken any preclusion risks . . . but . . . are clearly seeking by collateral attack to avoid the preclusive effect of a prior federal judgment. . . ." Maj. Op. at 2355. I would hasten to add to that list what we also do not have in this case, but was essential in *Moitie* and obviously present in *Carpenter*: a conceivable federal claim that could be asserted by the plaintiff. The majority essentially holds that a *conceivable federal claim is not necessary for removal*, as long as there is a federal defense of res judicata based on a federal judgment. To say that a plaintiff's claim can be removed to federal court when he has alleged no conceivable federal claim is true mockery of the well-pleaded complaint rule and the artful pleading doctrine. How can the artful pleading doctrine apply if the plaintiff's claims can not be recharacterized into an essentially federal claim that has been omitted by artful pleading? *See Ultramar*, 900 F.2d at 1415 (" . . . recharacterization of purported state-law claims into federal claims was essential before removal could occur.").

Moreover, *Carpenter* expresses a fear of extending federal court removal jurisdiction that is realized in this case. Referring to the fact that plaintiff Carpenter could pursue litigation under theories of both federal and state constitutional law, Judge Garwood pithily observes, "we cannot say that the failure to make a state claim ~~pendent~~ makes it federal." *Id.* at 369. Here, whether we like it or not, and whether the plaintiffs proceeded in good faith or not, they have filed a claim that is based purely and solely on state law. It is not amenable to recharacterization as an "artful pleading" of a federal claim. In my view, *Carpenter* expressly decries the implication that this state-law claim must be removed to federal court according to a broad interpretation of *Moitie*.

Any reader who has followed the majority opinion and this dissent thus far ought to appreciate that our dispute, while technical, is not trivial.⁷ The principles of limited federal court jurisdiction and the relative clarity of jurisdictional rules are at issue. *Moitie* and *Carpenter* can be read to authorize removal of this state-law-based case simply because it is subject to a federal preclusion

⁷ The majority's holding has another unfortunate consequence. Allowing federal jurisdiction to turn on whether the plaintiff's claims are barred by res judicata allows the defendant two bites at the apple: if upon the plaintiff's motion to remand the defendant loses the res judicata issue and the case is remanded, the defendant can relitigate the res judicata issue again in state court. The prior federal determination of the res judicata issue will not bind the state court, because, by virtue of the federal court's resolution of the res judicata issue, the federal court was not a court of proper jurisdiction. *See Robert A. Ragazzo, Reconsidering the Artful Pleading Doctrine*, 44 HASTINGS L.J. 273, 311 (January 1993).

defense. But to do so, as I have shown, intrudes on the scope of the well-pleaded complaint rule, expanding federal removal jurisdiction while engendering complexity and uncertainty in the future. I do not believe such results were intended by the Supreme Court in *Moitie* or by the *Carpenter* panel; the best way to effectuate those decisions' narrowly tailored goals is to apply them narrowly and specifically. Because the majority opinion does not do so, I respectfully dissent.

**Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001**

September 29, 1997

Linda V. Farrer
Suite 401, Realty Building
24 Drayton Street
Savannah, Georgia 31401

96-1971 - Mary Anna Rivet, et al. v.
Regions Bank, et al.

Dear Ms. Farrer:

The Court today entered the following order in the above stated case:

The petition for a writ of certiorari is granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. Rule 29.2 does not apply.

Enclosed are Memoranda describing the procedures under the Rules of the Court, together with a Specification Chart for your use. To further assist you in preparing your case before this Court, a copy of the Guide for Counsel is enclosed. Please note that requests for extensions of time to file briefs on the merits are not favored.

If you have any questions, please feel free to telephone me.

Very truly yours,
WILLIAM K. SUTER, CLERK

/s/ Sandy Nelsen
Sandy Nelsen
Merits Clerk
(202) 479-3032

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001

MEMORANDUM TO COUNSEL IN CASES
GRANTED REVIEW ON
September 29, 1997

The attention of counsel of record in cases granted review on the above date is directed to the following:

1. Unless expedited by the Court, your case will probably be calendared for oral argument in the January session of the Court. Counsel will be advised several weeks in advance of the argument date.
2. The petitioner's or appellant's brief on the merits is due 45 days from Sept 29 1997. The respondent's or appellee's brief on the merits is due ~~30 days after receipt of the brief of the petitioner or appellant~~: December 15, 1997 (3 p.m.) See special order of briefing schedule. Rule 25.

3. If the certified record of the proceedings below has not been transmitted to this Court, the Clerk will in the near future request the clerk of the court having possession of the record to certify and transmit it pursuant to Rule 12.7. The Clerk will delay making this request for a reasonable period of time to permit counsel to have access to the record locally for purposes of preparing the joint appendix.
4. The joint appendix must be printed and filed on or before 3 pm November 13, 1997. Counsel for the petitioner or appellant is primarily responsible for preparing and printing the joint appendix. Work should begin *immediately*. The Court strongly urges counsel to agree quickly on the contents of the joint appendix. Rule 26.
5. If no agreement on the contents of the joint appendix is reached, counsel for the petitioner or appellant must designate those portions of the record to be printed by October 9 1997, and counsel for the respondent or appellee must cross-designate by October 20, 1997. *<These dates must be adhered to.>* No cross-designations may be made by petitioner or appellant. Counsel for the petitioner or appellant should keep the Clerk advised of the date any agreement is reached, or the dates when the designation and cross-designation are actually made, as well as the date when the designated portions of the record are sent to the printer. Copies of the designations need not be forwarded to the Clerk.
6. In designating the portions of the record to be printed in the joint appendix counsel should remember that the entire record is available to the Court for reference and examination. Only

those portions of the record directly relevant to the issues being briefed should be printed. The briefs of the parties can cite and rely upon portions of the record that have not been designated for printing in the joint appendix. Rule 26.2.

* * *

8. In preparing and printing the joint appendix counsel for the petitioner or appellant should follow the instructions contained in the attached memorandum on "Printing the Joint Appendix."
9. The form and content of the briefs on the merits and the joint appendix are governed by Rules 24, 26, and 33.1. The text shall be typeset (e.g., wordprocessing, electronic publishing, or image setting) and reproduced by offset printing, photocopying, or similar process. The text shall be standard 11-point or larger type with 2-point or more leading between lines. The type size and face shall be no smaller than that contained in the United States Reports beginning with Volume 453. Briefs shall not exceed 50 pages. Type size and face shall be consistent throughout. No attempt shall be made to reduce, compress, or condense the typeface in a manner that would increase the content of a document. See Rule 33.1(b) concerning quotations and footnotes. The previous Rules permitted "typewritten" briefs that were double spaced and not more than 110 pages in length. The revised Rules, effective May 1, 1997, do not allow "typewritten" briefs.
10. The brief on the merits for petitioner or appellant must have a *light blue* cover, the brief for the respondent or appellee must have a *light red*

cover. A reply brief, if any, must have a yellow cover. A color chart is available from the Clerk.

11. A reply brief must be filed in the Clerk's office within 30 days of the receipt of the brief for the respondent or appellee, or actually received by the Clerk one week before argument, whichever is earlier. Rule 25.3.
12. Unless otherwise directed by the Court, counsel on each side will be allowed 30 minutes to argue and only one attorney may argue for each side. Rules 28.3 and 28.4.

Note: Counsel shall become familiar with the revised Rules of Court, effective date May 1, 1997. The Clerk's staff is ready and willing to provide assistance and advice on these procedures and on the application of the Rules to each case. Copies of the Rules are available from the Clerk.

Contact Mrs. Sandy Nelsen (202) 479-3032 for further information. FAX: (202) 479-2959.

(4)

No. 96-1971

Supreme Court, U.S.

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Supreme Court of the United States

October Term, 1997

MARY ANNA RIVET, MINNA REE WINER, EDMOND
G. MIRANNE, and EDMOND G. MIRANNE, JR.,

Petitioners,
versus

REGIONS BANK OF LOUISIANA, WALTER L.
BROWN, JR., PERRY S. BROWN, and
FOUNTAINBLEAU STORAGE ASSOCIATES,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

- (1) Does this Court's holding in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 396 n. 2, 101 S.Ct. 2424, 2427 n. 2, 69 L.Ed.2d 103 (1981) permit removal of a state court controversy involving mortgage rights in real property located in the forum state, solely on the basis that the defendants intended to assert the affirmative defense of claim preclusion based on a prior federal judgment, where the Petitioners in state court did not file the prior federal action and had no conceivable claim that might have been brought in federal court?
- (2) May a United States District Court reach a final decision on the merits of a controversy prior to ascertaining whether federal jurisdiction over the controversy exists, and then use that decision on the merits as the sole basis upon which to invoke federal jurisdiction over the controversy?

LIST OF PARTIES

In accordance with Supreme Court Rule 29.6, Petitioners state as follows:

1. The caption of this case contains the names of all Petitioners who are parties.
2. Regions Bank of Louisiana, Respondent herein, is a wholly-owned subsidiary of Regions Financial Corporation.
3. Two individual Respondents, Walter L. Brown, Jr. and Perry S. Brown, are named in the caption of this case.
4. Fountainbleau Storage Associates, Respondent herein, is a Louisiana limited liability company whose principals and related parties and entities include the following:
 - (1) Bayou Plaza Development L.L.C.
 - (2) Storage Trust REIT
 - (3) Michael D. Aufrecht
 - (4) Burnam Storage Associates
 - (5) The Burnam Companies
 - (6) Chris Burnam
 - (7) Tim Burnam
 - (8) Roland von Kurnatowski

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PETITIONERS' BRIEF ON THE MERITS

TO THE HONORABLE CHIEF JUSTICE AND THE
ASSOCIATE JUSTICES OF THE SUPREME COURT OF
THE UNITED STATES:

MAY IT PLEASE THE COURT,

Petitioners, Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne, and Edmond G. Miranne, Jr., respectfully pray that the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, entered in this matter on March 13, 1997, be reversed, and an Order of this Court issue, remanding this case to the Civil District Court for the Parish of Orleans, State of Louisiana.

OPINIONS AND JUDGMENTS BELOW

The Opinion and Judgment of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered March 13, 1997, is reported at 108 F.3d 576 (5th Cir. 1997). The Slip Opinion of the Circuit Court (Case No. 95-30524) is reprinted in the Joint Appendix to this Brief at pages App. 48 through App. 90. The Order and Reasons of the United States District Court for the Eastern District of Louisiana (Civil Action No. 95-0426), entered April 20, 1995, is reprinted in the Joint Appendix to this Brief at pages App. 38 through App. 47.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the oral argument at the United States Court of Appeals for the Fifth Circuit was entered on March 13, 1997, affirming the Order and

Reasons of the United States District Court for the Eastern District of Louisiana, dated April 20, 1995. A Suggestion of *En Banc* Treatment was denied on April 15, 1997. The Petition for a Writ of Certiorari, timely filed on June 11, 1997, was granted by this Court on September 29, 1997.

STATUTES AND REGULATIONS INVOLVED

This case involves the following provisions of the United States Code:

Title 28 U.S.C. § 1441:

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which the action is brought.

STATEMENT OF THE CASE

I. Basis for federal jurisdiction in the court of first instance

This action was originally filed in the Civil District Court for the Parish of Orleans, State of Louisiana, to seek recognition of a mortgage on real property located in Orleans Parish, and damages for certain property transfers within Orleans Parish abrogating Petitioners' rights under that mortgage. It was removed to the United States District Court for the Eastern District of Louisiana, pursuant to 28 U.S.C. § 1441(b), on the basis of federal question jurisdiction. All named parties are citizens and

residents of the State of Louisiana. The essence of Petitioners' argument to this Court is that there was no basis for removal jurisdiction or for federal question jurisdiction in the District Court. In her dissent from the Opinion of the Court of Appeals, Judge Edith H. Jones succinctly noted the lack of federal jurisdiction:

This is a state law claim. The only federal element that plaintiffs could have pleaded is an anticipatory defense . . .

App. 86.

There is no basis on which this claim could have been brought originally in federal court. Both the District Court and the Fifth Circuit constructed a fatally flawed rationale for removal jurisdiction based upon *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 396 n. 2, 101 S.Ct. 2424, 2427 n. 2, 69 L.Ed.2d 103 (1981) (hereinafter referred to as "Moitie"). Utilizing this rationale, both lower courts employed completely self-referential reasoning in which they first made a final decision on the merits, i.e., that Petitioners' claims were barred by the preclusive effects of a prior federal Bankruptcy Court order, and then, in essence retroactively, based removal jurisdiction in the first instance on that final decision on the merits.¹ The District Court could not have exercised jurisdiction over this action in the first instance, and there was thus no basis for removal jurisdiction.

¹ Petitioners maintained below, and continue to maintain in this Court, that their claims are not subject to the preclusive effects of the prior federal Bankruptcy Court order. This will be discussed briefly in Section "VI" of the "Argument".

II. Statement of facts

In a complex series of real estate transactions finalized on December 29, 1993, Respondent Regions Bank of Louisiana ("Regions Bank"), which owned certain rights in a parcel of real property located in Orleans Parish, purchased all rights which it did not own from Respondents Walter L. and Perry S. Brown ("the Browns"), and then sold the entire fee interest to Respondent Fountainbleau Storage Associates ("FSA").² Record 181-185; 349-385. At the time of the sale to FSA, there was a currently valid \$5 million collateral mortgage³ duly recorded and re-inscribed in the name of Petitioners by the Recorder of Mortgages of Orleans Parish. App. 35-38.

The mortgage encumbered both the underlying leasehold estate (but not the Browns' interest), together with the buildings and other improvements, and was first recorded against the property on May 2, 1984. *Id.*; App. 39. No provision was made in the sale for recognition of Petitioners' mortgage. The various closing documents made no mention of it whatsoever, and Petitioners were given no notice of the transaction.

On April 11, 1994, more than three months after the sale in question, the mortgage was officially re-inscribed on the mortgage rolls of Orleans Parish by the Recorder

² Regions Bank is the successor corporate entity to both First Financial Bank, FSB, and SECOR Bank. In the interest of clarity, Regions Bank and all its various corporate predecessors will be referred to by that single name.

³ See Max Nathan, Jr., *The Collateral Mortgage, Logic and Experience*, 49 La.L.Rev. 39 (1988), for a discussion of the collateral mortgage, a unique Louisiana "hybrid security device, combining the elements of both pledge and mortgage". *Id.* at 39-40.

of Mortgages. App. 35-38. On December 29, 1994, Petitioners brought suit, by ordinary process, in the Civil District Court for the Parish of Orleans seeking recognition of their mortgage and damages for the transfers by Regions Bank in derogation thereof. Record 123-135.

Regions Bank had first come into possession of its rights in the subject property through a bankruptcy proceeding which terminated in 1986. App. 10-34. Prior to that time, the subject property had numerous liens and encumbrances against it, including a \$15 million first mortgage in the name of Regions Bank and Petitioners' mortgage, which was at that time a second or junior encumbrance. App. 16, 18 (Nos.: 4, 5, & 29). Between April and August of 1986, the bankruptcy trustee petitioned and was granted approval by the Bankruptcy Court for the Eastern District of Louisiana to sell the subject property, which was owned by the bankrupt estate. App. 10-34. At the bankruptcy sale, Regions used its first mortgage to "credit bid" and bought the buildings and improvements together with the leasehold estate.⁴ The underlying land was not subject to the bankruptcy sale and was owned by the Browns until Regions

⁴ The term leasehold estate is not a technically correct description, under the civil law, of Petitioners' mortgage rights herein. In Louisiana, a lease of real property is a personal contract which does not create full rights *in rem*, as at common law. App. 50 n. 2. Nevertheless, because Louisiana statutes do grant certain rights *in rem* to such leases (as well as to mortgages on buildings which are owned separately from the underlying land), such as the protection of the public records doctrine, this distinction is without a difference in these circumstances. *Id.* See also, La.Civ.Code Art. 464. Because the term "leasehold estate" has been used throughout this action, including in the opinion of the Court of Appeals, this Brief will continue to employ this term in the interest of continuity.

Bank bought it from them in December, 1993. Record 25-35.

The order of the Bankruptcy Court, dated June 17, 1986, authorizing the sale by the trustee, purported to authorize that the property be sold "free and clear of all liens and encumbrances". App. 12-15. It is undisputed, however, that no adversary proceeding was held pursuant to Fed.R.Bkrtcy.Proc. 7001, as is mandated by the Bankruptcy Code before the existence, validity, or priority of a mortgage such as Petitioners' mortgage may be determined.⁵ Record 294-305. It is also undisputed that the bankruptcy proceeding did not comply with any of the several procedures of § 363 of the Bankruptcy Code, and these procedures provide the only method, apart from Rule 7001, in which a mortgage may be removed from property of the bankrupt estate. *Id.* The only proceeding which was held with respect to the trustee's request was a "motion hearing" of a type which has consistently been held to be insufficient to cancel a lien or other encumbrance. Thus, as a matter of law, Regions Bank bought the property "subject to" Petitioners' mortgage.

Regions Bank maintained that Petitioners were barred by *res judicata* from proceeding with their suit, in

⁵ The basic rationale underlying the adversary procedures of Rule 7001 is notice and opportunity to be heard for mortgagees who are to have their substantive property rights affected. In fact, at the time of the trustee's request, there were approximately 60 additional liens or encumbrances on the subject property. App. 15-22. The Record does not disclose whether any of these lienholders received their Constitutionally required "*Mennonite*" notices. By holding only the kind of truncated motion hearing it did, the Bankruptcy Court implicitly undertook to cancel substantive property rights without adequate notice.

light of the order of the Bankruptcy Court, dated June 17, 1986. Record 472-479; App. 12-15. Regions Bank also maintained that the motion hearing in the Bankruptcy Court and the resulting Bankruptcy Court order were effective by themselves to extinguish Petitioners' mortgage, despite the lack of authorization for such a procedure in the Bankruptcy Code. App. *Id.* Nevertheless, no subsequent procedure was ever instituted to enforce the orders of the Bankruptcy Court, and, Petitioners' mortgage still stands on the mortgage rolls of Orleans Parish. Regions Bank has proffered no explanation for this, although a procedure to erase the mortgage has existed throughout.

Regions Bank's own first mortgage was never re-inscribed, and it expired under the applicable rule of prescription in September of 1993.⁶ It was thus duly removed from the mortgage rolls by the Recorder of Mortgages. Record 313-314; App. 35-38. In fact, Regions Bank's mortgage was actually extinguished by operation of law in 1986, pursuant to the Louisiana doctrine of confusion, when Regions Bank became the holder of both the mortgage and the subject property. Thus, at the time this action was commenced, apart from various liens that were subject to erasure by prescription, Petitioners' mortgage was the only good and valid encumbrance duly recorded against the subject property. *Id.* App. 52-53 & n. 7.

Both the District Court and the Court of Appeals sustained Respondents' affirmative defense of *res judicata*,

⁶ "Prescription" is a civil law term, borrowed from Roman law, which is analogous to the common law concept of statute of limitations. Thus a claim which falls outside the applicable statute of limitations is said to have prescribed.

holding that the order of the Bankruptcy Court, dated August 14, 1986 (App. 23-34), which approved, *ex post facto*, the trustee's sale of the property, was a "final judgment" having preclusive effect. App. 42-43, 68-70 & n. 56. (This August 14th order will be hereinafter referred to as the "Bankruptcy Court order".) Petitioners maintained that *res judicata* or claim preclusion did not apply for two reasons: First, the cause of action sued upon was not the same as that giving rise to the bankruptcy proceeding. The essential facts establishing the cause of action sued upon were the recorded existence of the mortgage – which was affirmatively reinscribed by the Recorder of Mortgages in 1994⁷ – and the sale in derogation of the mortgage in 1993, all of which occurred after the entry of the Bankruptcy Court order, and none of which was involved in the bankruptcy proceeding. Record 15-20; 123-135.

Second, Petitioners were not parties to the bankruptcy proceeding. Two Petitioners, Edmond G. Miranne and Edmond G. Miranne, Jr., appeared in the bankruptcy proceeding as creditors of the bankrupt estate, but were never named as parties thereto, and no adversary proceeding was held in which they could have formally contested the cancellation of their mortgage as required by the Bankruptcy Rules. Record 20-27. Even if this were enough to make those two Petitioners parties to that action for purposes of preclusion, the Bankruptcy Court had no power under the Bankruptcy Code to cancel the mortgage without an adversary proceeding, and thus, the

⁷ The mortgage note, which the mortgage secured, was duly reinstated by the maker, and prescription thus waived, in favor of Petitioners in 1989 and 1994. Record 138-139.

cancellation of the mortgage was not properly a part of any resulting order or judgment.

The other two Petitioners, Mary Anna Rivet and Minna Ree Winer, were and remain the spouses of the Mirannes, but they did not appear in the bankruptcy proceeding in any capacity and were not represented by counsel. Thus, Rivet and Winer may not rationally be said to have received their constitutionally required "Mennonite" notice.⁸

III. Course of proceedings and disposition in the court below.

Suit was commenced on December 29, 1994, in the Civil District Court for the Parish of Orleans. Removal

⁸ In order to reach its decision, the Fifth Circuit indulged in both a factual and legal presumption that Rivet's and Winer's husbands were representing the interests of their spouses through the Louisiana community property regime. There was no basis whatsoever in the Record for this presumption. In fact, were Petitioners equally able to reach beyond the Record, they could show that both of the respective sets of spouses are either parties to a matrimonial or separate property agreement, or are separately managing their individual interests in any and all matrimonial property. With respect to Winer and Miranne, Jr., such an agreement has even been filed, as of record, in both the Orleans Parish mortgage and conveyance records for many years. See MOB, 2345, Folio 412, and COB 767, Folio 87 (December 31, 1979). In such cases, the Louisiana community property regime does not even exist. See La.Civ.Code Arts. 2328-2329, 2340, 2370, *et seq.* Thus, there was utterly no basis for the Fifth Circuit to presume that the husbands were, *ipso facto*, representing the separate property interests of their wives, and in fact its presumption to that effect, which caused Rivet's and Winer's rights to be cast aside as of no moment, was quite wrong. See further discussion on this point at text accompanying n. 16, below.

was effected on February 3, 1995, by counsel for FSA. Petitioners moved to remand, and all Respondents moved immediately for summary judgment. On April 21, 1995, without oral argument, the District Court denied Petitioners' motion to remand and granted Respondents' motions for summary judgment. The District Court's Order and Reasons (hereinafter the "District Court Opinion"), was signed by the Court on April 20, 1995, and entered by the Clerk on April 21, 1995. App. 38-47. The judgment ordering dismissal of the entire action was signed on April 25, 1995, and entered by the Clerk of Court on April 27, 1995. On May 19, 1995, Petitioners filed a timely notice of appeal from both the Order and Reasons and the judgment ordering dismissal.

Briefing in the Court of Appeals was complete on October 19, 1995, and oral argument was held on October 2, 1996. The Court of Appeals affirmed the District Court in a two-to-one panel decision dated March 13, 1997. App. 48-83. Judge Edith H. Jones filed a dissenting opinion. App. 83-90. Petitioners' subsequent Suggestion of *En Banc* Treatment was denied without opinion on April 15, 1997. A Petition for a Writ of *Certiorari* was timely filed on June 11, 1997, and this Court granted *certiorari* on September 29, 1997. App. 91-95.

SUMMARY OF ARGUMENT

There was no basis for either removal jurisdiction or federal subject matter jurisdiction over this action in the District Court. Thus, the decisions of both lower Courts lack any jurisdictional basis and must not be allowed to stand. The sole basis relied upon for removal jurisdiction herein was an idiosyncratic interpretation by both the District Court and the Court of Appeals of footnote 2 of this Court's *Moitie* opinion. The essence of the matter

before this Honorable Court, therefore, is a reevaluation of the oft-quoted *Moitie* footnote.

The lower Courts' interpretation of *Moitie* is directly contrary to three unanimous opinions of this Court decided subsequent to *Moitie*, all of which re-affirmed the traditional limitations on removal jurisdiction which the Courts below seek to circumvent. Therefore, the lower Courts' interpretation of *Moitie* cannot be correct and should not be upheld. The Courts below held that removal jurisdiction may be based upon an affirmative defense, even where the plaintiff had no claim that might have been brought in federal court. This would limit removal jurisdiction only by the imagination of defense counsel in search of some conceivable defense grounded in federal law.

This is not a case of "artful pleading" by Petitioners to keep their claim out of federal court. There is no basis, artful or inartful, on which the Petitioners' claims might have been brought in federal court. No "disguised" federal claim is presented here. The state courts are presumed competent to decide issues of federal law, including the preclusive effects of prior federal judgments, where applicable.

The Courts below reached the merits without first deciding whether federal jurisdiction existed, and then justified their jurisdiction by the decision on the merits. This stands conventional practice on its head, and should not be countenanced by this Court.

In any event, federal jurisdiction cannot be based upon the legitimacy of the *res judicata* defense in this matter. Petitioners' claim in state court was not barred by the preclusive effects of the Bankruptcy Court order because the nucleus of operative fact, constituting the cause of action sued upon, did not arise until after the

entry of that order. In addition, Petitioners were not parties to the earlier proceeding. Any determination of the validity, priority, or extent of Petitioners' mortgage was not properly among the preclusive effects of the Bankruptcy Court order, because the Bankruptcy Court did not provide Petitioners with the essential elements of due process, notice and opportunity to be heard, before it purported to extinguish their substantive property rights.

Petitioners' state court action cannot be viewed as a collateral attack on the Bankruptcy Court order, because that order did nothing, in and of itself, to affect the recordation of Petitioners' mortgage, even if it be assumed, *arguendo*, that the proper procedures were followed in the Bankruptcy Court. Petitioners' mortgage was not erased by the Bankruptcy Court order. The recordation of a mortgage in Louisiana is conclusive proof that the mortgage exists. Only the Parish Recorder of Mortgages may erase a mortgage on land in Louisiana. The Bankruptcy Court did not order, and could not have ordered, the Recorder of Mortgages to erase Petitioners' mortgage. The Recorder of Mortgages was not brought before the Bankruptcy Court, and the Bankruptcy Court possessed no *in rem* jurisdiction over the land.

Louisiana has statutorily decreed that the Recorder of Mortgages *may not* erase a mortgage as the result of a bankruptcy or judicial sale. Louisiana also provides, however, a judicial procedure wherein a proper order, arising out of a bankruptcy proceeding, may be used to procure a State judgment directing the Recorder of Mortgages to erase a mortgage. Respondents evidently chose not to avail themselves of that procedure, for no such procedure was ever implemented and the mortgage was never erased. In essence, Respondents chose not to enforce the Bankruptcy Court order. Respondents' right to invoke the

state procedure to enforce the order has expired under Louisiana law, as well as under federal law.

ARGUMENT

I. The opinion below is directly contrary to controlling precedent of this Court.

Removal jurisdiction over the facts at bar is not supported by a single other reported opinion. The lower Courts' interpretation of the *Moitie* footnote (hereinafter referred to as the "Rivet Rule"⁹) also establishes a theoretical basis for removal that is contrary to every other opinion of this Court addressing removal jurisdiction, including three unanimous opinions decided subsequent to *Moitie* itself.¹⁰ Two of these subsequent opinions were written by Justice Brennan, who expressly dissented from the *Moitie* footnote, and all three of them were joined by Chief Justice Rehnquist, the author of *Moitie*.

In *Rivet*, the Fifth Circuit affirmed the District Court's reasoning that an essentially state law cause of action may be removed to federal court if the defendant in state

⁹ The "Rivet Rule" may be stated as follows: If a case removed from state court is found by the federal district court (in a final decision on the merits) to be "completely precluded" by a prior federal judgment, then for that reason alone, the federal court has removal jurisdiction, no matter what the nature of the cause of action.

¹⁰ *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989) (hereinafter referred to as "Oklahoma Tax Commission"); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (hereinafter referred to as "Caterpillar"); and *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) (hereinafter referred to as "Franchise Tax Board").

court intends to assert the affirmative defense of claim preclusion or *res judicata*, and the federal court finds, in a decision on the merits, that the defense would be effective. Relying on *Carpenter v. Wichita Falls Independent School District*, 44 F.3d 362 (5th Cir. 1995) (hereinafter "Carpenter"), the *Rivet* panel reasoned as follows:

In thus clearly setting forth the rule for this circuit, the *Carpenter* panel concluded by stating that:

"[w]e hold that *Moitie* should apply only where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law."

. . . we conclude that the district court properly reasoned that *Carpenter's* holding provides the sole framework for analyzing the jurisdictional issues raised [herein] . . . and just as the district court here found, *Carpenter* controls. Accordingly, if the defendants can show that [Appellant]'s state court suit . . . is in fact barred by the claim preclusive effects of the [prior federal judgment], then the district court's denial of the . . . motion to remand, and its dismissal of the suit for essentially the same reason, must be affirmed.

App. 64-65 (emphasis by the Court; footnote omitted).

The *Rivet* opinion also discusses the "artful pleading" exception to the well-pleaded complaint rule. Again relying on *Carpenter*, the opinion states as follows:

The common rationale for these jurisprudential exceptions – euphemistically known by the cynically sarcastic sobriquet of the "artful pleading exception" – is that when the plaintiff has available "no legitimate or viable state cause of action", but only a federal claim, he may not avoid

removal by artfully casting the federal suit as one arising under exclusively under state law. App. 56-57 (emphasis added and footnotes omitted).

According to the *Rivet* Panel, *Carpenter's* and *Moitie's* notion that removal jurisdiction is conferred by a state court defendant's assertion of an apparently effective affirmative defense of claim preclusion, is but a "rarer specie [sic] of artful pleading". App. 58. By this rationale, the *Rivet* Panel has in essence held that a state court suit to enforce a mortgage on land located in, and between residents of, the forum state, with no other connection to federal law than the presumed affirmative defense, is "essentially federal" in character. App. 58-59, 86.

At the outset, there are at least three points which are absolutely clear under this Court's precedent, and with respect to which the *Rivet* Rule is in direct violation of that precedent.

1. No "artful pleading"

First, this is not a case of "artful pleading". As Judge Jones points out in her dissent:

. . . what we also do not have in this case, but [which] was essential in *Moitie* and obviously present in *Carpenter*: a conceivable federal claim that could be asserted by the plaintiff. . . . To say that a plaintiff's claim can be removed to federal court when he has alleged no conceivable federal claim is true mockery of the well-pleaded complaint rule and the artful pleading doctrine. How can the artful pleading doctrine apply if the plaintiff's claims cannot be recharacterized into an essentially federal claim that has been omitted by artful pleading?

App. 88 (emphasis added and citation omitted).

As this Court has made plain, the artful pleading doctrine does not convert legitimate state claims into

federal ones, but rather applies, where applicable, to reveal a suit's "necessary federal character". See *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 23, 103 S.Ct. 2841, 2854, 77 L.Ed.2d 420 (1983). To say that a state court suit to enforce a mortgage is "either wholly federal or nothing at all" or that such a plaintiff "necessarily is stating a federal cause of action whether he chooses to articulate it that way or not" is a direct contradiction of *Franchise Tax Board*. See *Carpenter v. Wichita Falls Independent School District*, 44 F.3d 362, 366 (5th Cir. 1995), quoting, 14A Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3722 (2d ed. 1985).

Perhaps the most basic principle of the law of removal jurisdiction is that an action filed in state court may not be removed to federal court unless that action could have been brought originally in federal court. *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 840-841, 109 S.Ct. 1519, 1521, 103 L.Ed.2d 924 (1989). What the artful pleading doctrine does is simply to empower the district court to ascertain that the state court plaintiff has actually brought an action that could have been brought only in federal court, even though the plaintiff has "artfully" disguised the true federal nature of the claim. Because this state law mortgage enforcement action could not conceivably have been brought originally in federal court, it cannot be said that Petitioners have "disguised" the true nature of a federal claim, and there can be no removal jurisdiction on the basis of "artful" pleading. Perhaps the most pointed comment from the recent jurisprudence to this effect is found in *Rains v. Criterion Systems, Inc.*, 80 F.3d 339 (9th Cir. 1996):

The claim was authorized by state law and no essential federal law was omitted. The artful pleading doctrine does not permit defendants to

achieve what they are trying to accomplish here: to rewrite a plaintiff's properly pleaded claim in order to remove it to federal court.

80 F.3d at 344.

2. No removal for affirmative defenses

The second basic point stems from the fact that Fed.R.Civ.P. 8(c) expressly declares claim preclusion or *res judicata* (as well as discharge in bankruptcy) to be an affirmative defense. See *American Casualty Co. v. United Southern Bank*, 950 F.2d 250, 253 (5th Cir. 1992). This Court's precedent is both clear and well-settled: Removal jurisdiction is not conferred where the federal right is to be raised as a defense to a cause of action under state law. *Oklahoma Tax Commission*, 489 U.S. at 840-841, 109 S.Ct. at 1521. This is so even where the determination of the federal right or immunity either is or may be dispositive of the case. *Franchise Tax Board*, 463 U.S. at 13, 103 S.Ct. at 2848; *Caterpillar, Inc. v. Williams*, 482 U.S. at 396-398, 107 S.Ct. at 2431-2433; *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). See also *Arkansas v. Kansas & Texas Coal Co.*, 183 U.S. 185, 188, 22 S.Ct. 47, 48, 46 L.Ed. 144 (1901) ("jurisdiction is not conferred by allegations that defendant intends to assert a defense based on . . . a law . . . of the United States.") That an affirmative defense does not allow removal is perhaps the second most basic principle of removal jurisdiction. The *Rivet* opinion does not cite a single precedent or present a single argument as to why Rule 8(c)'s clear command should be ignored in this case. As this Court has made clear, the Federal Rules of Civil Procedure, which are "made law by congress supersede[] conflicting [court rules] . . . ". *Henderson v. United States*, ____ U.S. ___, 116 S.Ct. 1638, 1646, 134 L.Ed.2d 880 (1996).

The *Rivet* Rule's violation of these two cardinal principles of removal jurisdiction has been encapsulated by Judge Jones, in dissent, as follows:

The majority essentially holds that a *conceivable federal claim is not necessary for removal*, as long as there is a federal defense of *res judicata*, based on a federal judgment.

App. 88 (emphasis by Judge Jones).

3. State courts are competent

The third basic point concerns the *Rivet* Panel's apparent rationale for its Rule: to prevent Petitioners from engaging in a "collateral attack" on the earlier Bankruptcy Court order. App. 69-70, 72-79, 81. Quite obviously, Petitioners do not view their cause of action in this light.¹¹ Nevertheless, even if this were a completely fair characterization of this case, that would still not confer removal jurisdiction. Once again, this Court has made it clear that:

. . . when a state proceeding presents a federal issue, *even a pre-emption issue*, the proper course is to seek resolution of that issue by the state court. . . . [Appellees] must present their [claim preclusion] argument to the [Louisiana] state courts, which are presumed competent to resolve federal issues.

Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 108 S.Ct. 1684, 1691, 100 L.Ed.2d 127 (1988) (emphasis added); *Clothing Workers v. Richman Brothers Co.*, 348 U.S. 511, 518, 75 S.Ct. 452, 456-457, 99 L.Ed.2d 600 (1955).

In short, Respondents' proper course of action was to have presented their affirmative defense based upon

¹¹ This will be discussed in Section "VII" of this Brief.

claim preclusion to the Louisiana State Court. Based upon the violation of precedent discussed in this section alone, the *Rivet* Rule should not be allowed to stand.

The *Rivet* Rule allows a District Court to sustain the removal of a case from state court where that case has no essential federal character whatsoever and could not be re-pleaded as a federal claim. Specifically, the direct implication of the *Rivet* Rule is that a suit between citizens of the forum state, to enforce a mortgage on real property located in the forum state, is "essentially federal in character" merely because the defendant intends to assert an affirmative defense based upon a prior federal bankruptcy order, even where the order was never actually enforced so as to have the mortgage in question erased. Not only is the *Rivet* Rule thus a mockery of the "well-pleaded-complaint" rule, but it is also a gross imposition of naked federal authority upon the sovereignty of state courts. See *Fry v. United States*, 421 U.S. 542, 547, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363 (1975).

II. An expansive reading of the *Moitie* footnote has been implicitly disavowed by this Court.

The *Rivet* panel found that this case was controlled by the Fifth Circuit's earlier decision in *Carpenter*. The point at issue in *Carpenter* was the interpretation of the famous "enigmatic footnote" in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 396 n. 2, 101 S.Ct. 2424, 2427 n. 2, 69 L.Ed.2d 103 (1981). *Carpenter*, 44 F.3d at 368-369, 370-371. If the *Rivet* Rule is a correct interpretation of *Carpenter*, and if *Carpenter*'s interpretation of the *Moitie* footnote is the correct one, then that aspect of *Moitie* has been overruled *sub silentio* by this Court's subsequent decisions, and both *Carpenter* and *Rivet* are in

violation of that subsequent precedent in several particulars, as discussed in the preceding sections.

Moitie was decided in 1981. Less than two years later, in *Franchise Tax Board*, this Court unanimously reaffirmed every previously established principle of removal jurisdiction under 28 U.S.C. § 1441(b) without mentioning, citing, or in any way clarifying the controversial footnote. Moreover, Justice Brennan, the author of *Franchise Tax Board*, had expressly dissented from the *Moitie* footnote, and the author of *Moitie*, (then) Justice Rehnquist, joined the later opinion. As demonstrated above, *Carpenter's* and *Rivet's* interpretations of the *Moitie* footnote are simply not consistent with the unambiguous principles laid down in *Franchise Tax Board*.

Subsequently, in *Caterpillar* (1987) and *Oklahoma Tax Commission* (1989), both of which were also unanimous decisions, Justice Brennan and a *per curiam* Court gave ringing affirmation of certain specific aspects of removal jurisdiction that are in no way consistent with *Moitie*, *Carpenter*, or the *Rivet* Rule. Most particularly, in *Oklahoma Tax Commission*, this Court held:

... it has long been settled that the existence of a federal [defense] to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense arises under federal law.

489 U.S. at 841, 109 S.Ct. at 1521, *citing*, *Gully v. First National Bank*, 299 U.S. 109, 109 S.Ct. 96, 81 L.Ed. 70 (1936). As noted previously at pages 17-18, this is so even where the determination of the federal right or immunity either is or may be dispositive of the case.

In *Caterpillar*, this Court unanimously suggested that the artful pleading doctrine should be strictly limited to

cases involving complete preemption of the state cause of action. 482 U.S. at 392, 396 & n. 11, 107 S.Ct. at 2430, 2432 & n. 11. And in 1986, also subsequent to *Moitie*, this Court specifically declined to recognize federal question jurisdiction merely because a state cause of action required the interpretation of a federal statute. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 810, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986). No one has argued, and no court has decided, that "complete preemption" applies in this case. Such a ruling would mean that the federal Bankruptcy Code has "completely preempted" state laws concerning the recordation of mortgages throughout the entire United States.

These post-*Moitie* precedents have led at least three scholarly commentators to conclude that either the *Moitie* footnote has been overruled, or that it should be treated merely as an aberration. See Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 Hastings L.J. 273, 303-315 (January, 1993) and Stanley Blumenthal, Jr., *Artful Pleading and Removal Jurisdiction*, 35 UCLA L.Rev. 315, 365 (1987) (arguing that *Moitie's* ruling on the removal issue should be disregarded). Moreover, as the Ragazzo article points out, allowing removal jurisdiction to turn upon claim preclusion affords the defendant two bites at the apple. If the federal court concludes that claim preclusion does not apply, then the same defendant may re-allege that defense in the state court. The federal determination will have no preclusive effect because the federal court will have used it to conclude only that it did not have subject matter jurisdiction. Ragazzo, *op. cit.* at 311; see also Judge Jones's dissent in *Rivet*, App. 89 n. 7.

Similarly, Rona L. Pietrzak, *Comment, Federated Department Stores v. Moitie: A Radical Departure From Traditional Removal Jurisdiction or an Aberration?*, 43

Univ.Pitt.L.Rev. 1165, 1178 (1982), concludes that this Court could not have actually intended to alter the law of removal jurisdiction, since the controversial footnote was so "striking in its cautiousness". If Professor Pietrzak was correct, that fact has certainly not been perceived by lower federal judges. *Rivet* is not only the latest, but also the most extreme example of the extent to which lower federal courts have felt empowered to expand removal jurisdiction by the *Moitie* footnote.

The current situation has led to a veritable quandary in the district courts where they have tried to apply *Moitie* in light of subsequent precedent from this Court. This quandary may perhaps best be seen in two particular district court cases. In *Magic Chef, Inc. v. International Molders Union*, 581 F.Supp. 772, 776 n. 4 (E.D.Tenn. 1983), the Eastern District of Tennessee found that *Moitie*'s value as authority regarding removal jurisdiction was "supersede[d]" by this Court's opinion in *Franchise Tax Board*, which, as noted, was written by Justice Brennan, a vocal dissenter in *Moitie*, and does not cite *Moitie* at all. In *Gold v. Blinder Robinson & Co.*, 580 F.Supp. 50, 53 (S.D.N.Y. 1984), the Southern District of New York found that:

Although it is perhaps impossible intellectually to reconcile *Moitie* with established law, it seems proper, absent more direct and fuller consideration of the issue by the Court, to view the result as an aberration. . . .

As recently as August 15th of this year, Chief Judge Posner of the Seventh Circuit articulated most starkly the great void by which *Moitie* is separated from other writings of this Honorable Court, when he said that the footnote ". . . is (very uncharacteristically for its author, Justice, now Chief Justice Rehnquist) based on distrust of state courts . . .". *In re Brand Name Prescription Drugs Antitrust Litigation*, MDL No. 997, Slip Op. at 26 (7th Cir.

August 15, 1997) (Posner, J.). While Petitioners do not embrace Judge Posner's assessment of the intellectual basis of the *Moitie* footnote itself, it is beyond quarrel that many judges who have enlisted the "enigmatic" footnote in aid of their views have indeed manifested a "distrust of state courts" and have viewed as the appropriate remedy a limitless expansion of federal jurisdiction.

Oklahoma Tax Commission, Caterpillar, and Franchise Tax Board make it clear that an affirmative defense based on federal law will not support removal jurisdiction. Furthermore, seven years after *Moitie*, in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988), this Court held that state court defendants "must present their [affirmative defense] argument to the . . . state courts, which are presumed competent to resolve federal issues." 486 U.S. at 150, 108 S.Ct. at 1691 (emphasis added).

This Honorable Court has long evidenced a respect for the competence and ability of state court judges to deal with federal issues, including preclusion. As Chief Judge Posner indicated, the various interpretations of the *Moitie* footnote, as exemplified by the *Rivet* Rule, evidence an implicit judicial presumption to the contrary and thus should not be allowed to stand. Further, the clear trend of this Court's jurisdictional precedents continues toward a narrowing of federal jurisdiction.

Thus, Petitioners respectfully submit that, if the Courts below have accurately divined the implications of the *Moitie* footnote, then that footnote has been superseded or overruled *sub silentio*, and cannot be used to support removal jurisdiction. Alternatively, if the lower Courts have incorrectly interpreted the *Moitie* footnote, and it was never intended by this Court to sustain such an expansion of removal jurisdiction, then obviously the

reliance upon *Moitie* in this case was misplaced. Indeed, at least two other Courts of Appeals have interpreted footnote 2 more narrowly than the Fifth Circuit and in such a way that removal could not be supported on the facts at bar.

The most narrow reading of the *Moitie* footnote, and the resulting rule that corresponds most closely with the facts of *Moitie* is found in *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754 (2nd Cir.), cert. denied, 479 U.S. 885, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986). There, the Second Circuit articulates a rule that permits removal under *Moitie* only where: (1) the state court plaintiff has filed a claim "the elements [of which are] virtually identical to those of a claim expressly grounded on federal law"; and (2) the plaintiff "had previously elected to proceed [on that claim] in federal court". 794 F.2d at 760. If the Fifth Circuit had adopted this rule, the instant case could not have been removed.

Petitioners respectfully submit that, if the *Moitie* footnote has not in fact been overruled or superseded, then the Second Circuit's most narrow reading of the footnote should have been adopted herein. Such a ruling would have complied with *Carpenter*'s stated intention to limit the applicability of the footnote strictly to the facts of the *Moitie* case. 44 F.3d at 369. To narrow the *Sarkisian* rule even further, it should also be required, as Judge Jones and the Ninth Circuit would do, that the prior federal proceeding have terminated in a final judgment, that decided a claim under federal law, with preclusive effect against the present state court plaintiff. App. 84 n. 3; *Ultramar American Limited v. Dwelle*, 900 F.2d 1415 (9th Cir. 1990).

Here, however, the doctrinal validity of the *Rivet* Rule is the basic issue before this Court, and its repudiation would be completely determinative of the lack of removal jurisdiction, thus resulting in the remand of this case to state court. The *Moitie* footnote, and the *Rivet* Rule, should not be allowed to continue to confuse and undermine the otherwise clear principles of removal jurisdiction articulated by this Court. Petitioners respectfully submit that the correct reading of this Court's post-*Moitie* precedent is that footnote 2 has either been implicitly clarified, superseded, or overruled *sub silentio*.

III. The opinion below is not supported by precedent in any other reported opinion.

As Judge Jones points out in her dissent, "the majority has cited no case" (and Petitioners have found no case) "where *Moitie* removal has been allowed where the [state court] plaintiff had not [himself] brought a prior suit grounded in federal law". App. 84 n. 3. As noted above, the *Rivet* majority felt that it was bound by the Fifth Circuit's prior ruling in the *Carpenter* case. App. 63-65. Petitioners argued below that much, if not most, of *Carpenter*'s discussion of *Moitie* was *dicta*, since that case actually found that removal jurisdiction did not exist and remanded Mrs. *Carpenter*'s action to the Texas State Court. App. 668-685; 44 F.3d at 370-371. Judge Jones agreed with this analysis of *Carpenter*. App. 87-88. The purpose and effect of *Carpenter*'s treatment of *Moitie* was to limit the application of footnote 2 to the facts of *Moitie*. The *Carpenter* Court said:

Moitie is a *res judicata* case, not a removal case. The decision centered on the Ninth Circuit's creation of a novel exception to the rule of *res*

judicata, an issue the [Supreme] Court was evidently eager to reach. Furthermore, the marginal treatment of the removal issue makes us hesitate to expand *Moitie* beyond its facts, for a broad interpretation would counter principles established long before, and reaffirmed after, footnote 2 was written.

44 F.3d at 369 (footnote omitted).

Obviously, the facts at bar do not square with the facts of *Moitie*. Here, Petitioners did not file the prior federal action relied upon for its preclusive effects (App. 84-85 & n. 3), and they have no "conceivable federal claim" based upon the cause of action as alleged. App. 88. In *Moitie*, plaintiffs had filed and lost the prior antitrust claim in federal court, and had simply refiled the same factual allegations under a state antitrust statute. 452 U.S. at 395-397, 101 S.Ct. at 2426-2427. Again, as Judge Jones put it:

In every respect, [the *Rivet*] characteristics represent a more complex procedural scenario than did the *Moitie* plaintiff's copycat pleadings in federal and then state court.

App. 88.

Indeed, the very fact that the *Rivet* majority can purport to feel bound by the holdings in *Carpenter* and *Moitie*, and then proceed to fashion a holding so far beyond the facts of either case, is illustrative of the intellectual morass into which the Circuit Courts of Appeals have plunged themselves in attempting to apply an expansive reading of the *Moitie* footnote to the otherwise clear jurisprudence of removal jurisdiction. This morass is well illustrated by the colloquy between the *Rivet* majority (App. 77-79) and Judge Jones in dissent (App. 84-85 & nn. 3, 4, & 5) with respect to the proper analysis of *Moitie* as well as prior precedent from other circuits.

What follows is an analysis of selected Circuit Court cases applying the *Moitie* footnote. When reviewing this analysis, there are three points that should be borne in mind: (1) Not a single case prior to *Rivet* has allowed *Moitie* removal where, as here, the state court plaintiff did not himself file the prior federal action which was relied upon for its preclusive effects. (2) The analytical formulation of every post-*Moitie* case, where removal was allowed on the basis of *Moitie*, is in violation of this Court's precedents with respect to removal jurisdiction in either *Franchise Tax Board, Oklahoma Tax Commission*, or *Caterpillar*. (3) Every one of these cases is also in violation of this Court's command in *Chick Kam Choo* that state courts are "presumed competent" to ascertain and apply the preclusive effects of a prior federal judgment. 108 S.Ct. at 1691.

Perhaps the most interesting wrinkle in *Moitie* analysis lies in two early Ninth Circuit cases, the Circuit whence *Moitie* itself arose. First, soon after *Moitie* was decided by this Court, the Ninth Circuit had its first occasion to apply footnote 2 in the context of removal jurisdiction. In *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1427 (9th Cir. 1984), the Court was confronted with facts virtually identical to *Moitie* and held that in order to fall within the meaning of footnote 2, the subsequent state claim must be "merely the same . . . in disguise." Three years later, in *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368 (9th Cir.), cert. denied, 484 U.S. 850, 108 S.Ct. 150, 98 L.Ed.2d 106 (1987), the same Court was confronted with facts more akin to those in *Carpenter*, where a single plaintiff filed simultaneous actions in federal and state courts.

The *Sullivan* opinion presaged *Carpenter* and reached the correct result on those facts by ordering remand of

the state action to state court. 813 F.2d at 1377. The analytical problem with *Sullivan*, however, was that in *dicta* the Court went so far as to suggest, in so many words, that *Moitie* removal could be justified on the basis of an affirmative defense if that defense were to be based upon the complete preclusion of the state action by the *res judicata* effects of a prior federal judgment. Relying upon *Salveson*, the Court speculated that:

A less expansive explanation for *Moitie*'s use of the artful pleading doctrine is that *Moitie* permits removal only if a federal *res judicata* defense is present.

813 F.2d at 1375.¹²

The *Sullivan* case was decided on April 20, 1987. 813 F.2d at 1368. Less than two months later, on June 9, 1987, this Court handed down *Caterpillar*, 482 U.S. at 386, 107

¹² Interestingly, the *Sullivan* Court goes on to note that its expansive view of *Moitie* is contrary to then-existing Fifth Circuit precedent, as laid down in *Powers v. South Central United Food & Commercial Workers Union*, 719 F.2d 760, 766 & n. 5 (5th Cir. 1983). Twelve years later, when Respondents effected their removal herein, the Fifth Circuit still did not countenance the kind of removal expansively discussed in *Sullivan*, based upon an affirmative defense arising under federal law. See, e.g., *Willy v. Coastal Corp.*, 855 F.2d 1160, 1167-1172 (5th Cir. 1988). Even the *Carpenter* holding, as pointed out by Judge Jones, would not countenance such a removal. It is only the *Carpenter* Panel's speculation, in *dicta*, which seems to adopt the *Sullivan dicta*, that can at all rationally be read to authorize the *Rivet* removal. Yet, when Respondents effected their removal, on Feb. 3, 1995, *Carpenter* had not yet been decided. One wonders what authority Respondents could have been relying upon to justify their removal - the *Sullivan dicta*? For them, the arrival of *Carpenter* a few days after their removal was truly providential, and rescued them from what should have been sanctions pursuant to Fed.R.Civ.P. 11. See *Willy v. Coastal Corp.*, *supra*, 855 F.2d at 1172-1173.

S.Ct. at 2425, in which it was made absolutely clear that a federal affirmative defense will not confer removal jurisdiction. 482 U.S. at 396-398, 107 S.Ct. at 2431-2433. Moreover, the *Caterpillar* opinion, written for a unanimous Court, quoted from Justice Brennan's dissent in *Moitie* itself, where he strongly suggested that the artful pleading doctrine should be confined to "areas of the law preempted by federal substantive law". *Id.* at 2432 n. 11, quoting *Moitie*, 452 U.S. at 410 n. 6, 101 S.Ct. 2433-2424 n. 6.

From the foregoing, it would appear obvious that this Court did indeed intentionally eviscerate the *Moitie* footnote, at least insofar as it purports to grant removal jurisdiction on the basis of an affirmative defense grounded on federal law other than complete pre-emption. However, this does not appear to be so obvious among the Courts of Appeals. For example, both *Carpenter* (44 F.3d at 370 n. 12) and *Rivet* (App. 61-62) cite *Sullivan* and take at least a substantial portion of their authority from the *Sullivan dicta* discussed above. Similarly, in 1990, the Ninth Circuit again allowed *Moitie* removal based upon an affirmative defense. *Ultramar America Limited v. Dwelle*, 900 F.2d 1412, 1415 (9th Cir. 1990).

The facts of *Ultramar*, however, did at least present an instance where the state court plaintiff had himself filed the prior federal action, as Judge Jones points out. App. 84 n. 3. But as Judge Jones also points out, the *Rivet* "majority implicitly acknowledges that while it is not 'constrain[ed]' from allowing *Moitie* removal where the plaintiff has not brought a prior claim, it is broadening the scope of *Moitie* removal beyond what has been allowed in other circuits." *Id.* As noted, all of the other cases where *Moitie* removal was allowed involved factual

situations where the plaintiff had brought the prior action. Nevertheless, the analysis in most, if not all, of these cases is broad enough to take *Moitie* removal to the limits of *Rivet* and beyond.

In *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754, 760-761 (2nd Cir.), cert. denied, 479 U.S. 885, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986), for example, the Second Circuit speculated that *Moitie* removal would be permitted in fact patterns similar to *Sullivan* and *Carpenter* where a plaintiff files simultaneous actions in federal and state courts. This analysis is obviously beyond that of both *Sullivan* and *Carpenter*, and leaves the door open to take the analysis even beyond *Rivet* to situations where there is no prior federal judgment. For a collection of cases evidencing the expansive rationales assigned to *Moitie* among the several Circuits, the attention of the Court is respectively directed to footnotes 35 and 36 of the *Rivet* opinion. App. 62, nn. 35 & 36. For a discussion of the very much more limited rationales of the cases upon which the *Moitie* footnote itself relied, the attention of the Court is respectfully directed to footnote 5 of Judge Jones' dissent. App. 85, n. 5. For a comprehensive analysis of this Court's sixty to seventy year trend of limiting and narrowing the jurisdictional access to federal courts in general, the attention of the Court is respectfully directed to Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 Wake Forest L.Rev. 927 (1996).

IV. Further development of the *Rivet* Rule will entail an enormous expansion of federal jurisdiction.

It has been discussed above that the next logical step down the path of the *Rivet* Rule would be a judicial formulation, ostensibly based on the *Moitie* footnote, where removal is allowed in a situation where there is no

prior federal judgment, but where jurisdiction is based on an affirmative defense that arises under federal law involving a mere prior order of a federal court that was not a final judgment. Judge Jones, writing in *Rivet*, apparently felt that this would happen. In fact, at least one District Court, subsequent to *Rivet*, has already countenanced such a removal, although the decision was reversed by the Court of Appeals.

In *In re Brand Name Prescription Drugs Antitrust Litigation*, MDL No. 997, (7th Cir. August 15, 1997), the Seventh Circuit reversed a removal pursuant to *Moitie*, where the only prior federal ruling was an order denying class certification. A group of plaintiffs had initially filed a class action in federal court and, following denial of certification, had filed the identical action in Alabama State Court, seeking certification under the State class action statute. The defendants removed the case under, *inter alia*, *Moitie* and the "artful pleading" doctrine. *In re Brand Name Prescription Drugs Antitrust Litigation*, MDL No. 997, Slip Op. at 21-24. The District Court effectively agreed with the defendants and denied the class plaintiffs' motion for remand. In reversing the District Court, Chief Judge Posner reasoned as follows:

There is no federal judgment here. Neither when the [state court] suit was filed nor when the motion to remand was filed was there any ruling by the district court, let alone a judgment, barring the suit on [any federal] grounds. . . . The twist that *Moitie* gave to the doctrine [of removal jurisdiction] . . . especially since it appears only in a footnote, should be narrowly construed in the interest of maintaining comity between the federal government and the states and keeping federal jurisdiction within the limits prescribed by congress.

Id., Slip Op. at 24, 26.

Petitioners submit that the Seventh Circuit reached the correct decision, but the Court felt that the issue was a "close one" because of "persisting uncertainty about . . . the scope of the doctrine of artful pleading after *Moitie's* footnote . . . ". Slip Op. at 27. Without *Moitie* there would not have been any conceivable basis for removal jurisdiction. And, as noted, the District Court allowed *Moitie* removal in a situation where there was no prior judgment. It is clear from this case that the theory of removal jurisdiction has commenced yet a further slide down the proverbial "slippery slope", just as Judge Jones sensed in her dissent. App. 86-87.

For all the reasons assigned above, this Court should not allow the *Rivet* Rule to stand in contradiction to every other precedent concerning removal jurisdiction. The necessity for this Court to reverse *Rivet* is expressed most pointedly by Judge Jones in dissent:

Any reader who has followed the majority opinion and this dissent this far ought to appreciate that our dispute, while technical, is not trivial. The principles of limited federal court jurisdiction and the relative clarity of jurisdictional rules are at issue. *Moitie* and *Carpenter* can be read to authorize removal of this state-law-based case simply because it is subject to a federal preclusion defense. But to do so, as I have shown, intrudes on the scope of the well-pleaded complaint rule, expanding removal jurisdiction while engendering complexity and uncertainty in the future. I do not believe that such results were intended by the Supreme Court in *Moitie* or by the *Carpenter* panel.

App. 89-90 (emphasis added and footnote omitted).

V. The opinion below makes a final determination on the merits before jurisdiction has been established.

The *Rivet* opinion, as well as the *Carpenter dicta*, does fundamental violence to the most basic analytical framework of all federal subject matter jurisdiction, including removal jurisdiction. A basic principle of subject matter jurisdiction is that the determination of the existence of jurisdiction must be made first, and if jurisdiction does not exist – as it does not in this case – then no further action may be taken that will affect the merits of the claim. See *Simpkins v. District of Columbia Government*, 108 F.3rd 366, 371 (D.C. Cir. 1997) (" . . . the rule is strict that once a court determines that it lacks subject matter jurisdiction, it can proceed no further"); *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 221 (2nd Cir. 1963); *Wright & Miller, Federal Practice & Procedure*, § 1350 at 210 & n. 28 (2d ed. 1990). See also *McNeil v. United States*, 508 U.S. 106, 113, 113 S.Ct. 1980, 1984, 124 L.Ed.2d 21 (1993).

Moreover, it is well-settled that:

Summary Judgment is a judgment on the merits; it has the same effect as if the case had been tried by the party against whom judgment is rendered and decided against him.

Daigle v. Opelousas Health Care, Inc., 774 F.2d 1344, 1348 (5th Cir. 1985) (Rubin, J.) (emphasis added). See also *Holy Cross College v. Louisiana High School Athletic Ass'n*, 632 F.2d 1287, 1289 (5th Cir. 1980), quoting *Spector v. L. Q. Motor Inns, Inc.*, 517 F.2d 278, 281 (5th Cir. 1975) (A district court's " . . . jurisdictional inquiry is 'limited to observing whether the complaint is drawn to seek recovery under a federal statute . . . '").

And, as this Court has held unequivocally:

Whether the complaint states a cause of action on which relief could be granted is a question of

law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction.

Bell v. Hood, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946) (emphasis in original). Indeed, *Bell v. Hood's* admonition that a decision on the merits may be made only "after and not before the court has assumed jurisdiction" applies with even stronger force with respect to a motion for summary judgment. See also *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-231, 110 S.Ct. 596, 607-608, 107 L.Ed.2d 603 (1990); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 912, 917 (1951); *Barnett v. Brown* 83 F.3d 1380, 1383 (Fed.Cir. 1996) (" . . . any statutory tribunal must ensure that it has jurisdiction before adjudicating the merits") (emphasis by the Court).

The *Rivet* opinion, however, sets up an analytical framework where a final decision on the merits (complete preclusion) is made first – before jurisdiction has been established – and then that final decision on the merits is used as the sole basis for the Court's jurisdiction to reach a final decision on the merits. This analytical framework is completely circular and self-referential. To somewhat mischievously paraphrase the *Rivet* majority's reasoning: the Court has no jurisdiction to decide the merits until it decides the merits, which decision gives it jurisdiction to decide the merits in the first place. This kind of reasoning could justify virtually anything, not to mention the fact that, if this became the norm, substantial discovery in the federal courts would become a regular part of deciding a motion to remand.¹³

¹³ Indeed, in this case, Petitioners filed an Affidavit of Counsel in the District Court, pursuant to Fed.R.Civ.P. 56(f),

This analytical flaw is clear from even a cursory reading of the *Rivet* opinion. The first half of the opinion (App. 48-65) determines that removal jurisdiction will exist if a state court action is "completely precluded". But it is not until the second half of the opinion (App. 65-83), when the Court is considering the merits of the case pursuant to a motion for summary judgment, that the opinion concludes that the Court does indeed possess jurisdiction because the case is "completely precluded". Undeniably, a judicial finding that a cause of action is "completely precluded" by any prior judgment, whether federal or state, is a final determination on the merits and essentially ends the plaintiff's case. The *Rivet* Rule not only permits, but actually requires that this finding be made first, prior to any finding of jurisdiction, and then used as the sole basis of jurisdiction.

VI. Federal jurisdiction could not have been based upon a legitimate affirmative defense here, since Petitioners' claims below were not barred by the doctrine of claim preclusion or *res judicata*.

Because of the lack of removal jurisdiction, the substance of Respondents' affirmative defense of claim preclusion or *res judicata* was not properly before the District Court. Even if the *Rivet* Rule, including its self-referential

specifying that counsel anticipated discovery to show good reason why Respondents had been unable to procure cancellation of their mortgage. Moreover, there was "no adequate time for discovery" in this case. Under this Court's precedent, this fact alone should have precluded a grant of summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Yet, neither Counsel's Affidavit, nor the lack of adequate time for discovery, is even mentioned by the Fifth Circuit's opinion below.

circle of jurisdictional reasoning, were to be countenanced, the irony is that removal jurisdiction would still have been inappropriate in this case, because the requirements of claim preclusion are not met, and thus Petitioners' claims were not "completely precluded". In the interest of analytical completeness, this point will be discussed briefly hereafter. For a more complete treatment of the doctrine of claim preclusion as applied to the facts at bar, the attention of the Court is respectfully directed to Petitioners' memorandum of law in the District Court. Record 282-294.

There are at least three reasons why the Bankruptcy Court order is not claim-preclusive of Petitioners' claims herein. First, the cause of action sued upon is not the same as the cause of action giving rise to the bankruptcy proceeding, because the two essential elements of the present cause of action did not occur until more than seven years after the Bankruptcy Court order was entered. Second, the Petitioners were not parties to the earlier bankruptcy proceeding in such a way that made them subject to any preclusive effects of the Bankruptcy Court order. Third, because the Bankruptcy Court did not follow the procedures mandated by the Bankruptcy Code for determining the "validity, priority or extent" of a mortgage on property of the debtor, 11 U.S.C. § 363; Fed.R.Bkrtcy.Proc. 7001, the cancellation of the mortgage was not a part of the preclusive effects of the Bankruptcy Court order.¹⁴ See *In re Terrace Chalet Apartments, Ltd.*, 159 B.R. 821, 825 (N.D. Ill. 1993) (holding that a bankruptcy

¹⁴ The next section will demonstrate that, at a minimum, Respondents chose not to execute or enforce the bankruptcy judgment in such a way as to have the mortgage erased, and that any right they may have had to do so has now expired.

sale cannot extinguish a secured party's lien unless one of the exceptions of § 363 applies).

As to the first point, there can surely be no doubt that the instant cause of action is not the same as that in the Bankruptcy Court. The Bankruptcy Court order was entered on August 14, 1986. App. 23-34. The cause of action there, for preclusion purposes, was the statutorily defined insolvency of the debtor. This action, on the other hand, was commenced in 1994. The essence of the instant cause of action is the sale of property in 1993 and the recorded existence of the mortgage at the time of the sale. This cause of action did not exist prior to 1993. Moreover, the mortgage itself was formally and officially re-inscribed on the mortgage rolls in 1994, and this constituted a post-1986 official act of the State of Louisiana. La.Civ.Code Arts. 3342-3348, 3386-3396.

It is well-settled that claim preclusion or *res judicata* does not apply to a cause of action that arises out of occurrences subsequent to the earlier judgment. See *Manning v. City of Auburn*, 953 F.2d 1355, 1359-1360 (11th Cir. 1992); *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990); *Harkins Amusement Enterprises, Inc. v. Harry Nace Co.*, 890 F.2d 181 (9th Cir. 1989). Moreover, Courts have consistently refused to apply *res judicata* to a cause of action that relies on even one new fact. See *Jackson v. Johns Manville Sales Corp.*, 727 F.2d 506, 516-522 (5th Cir. 1984) (preclusion did not bar a suit for injuries that grew out of the same conduct that was the subject of the earlier action, but which had not "matured" prior to the earlier judgment); *Household Goods Carriers' Bureau v. Terrell*, 452 F.2d 152, 157 n. 11 (5th Cir. 1971); *Intermedics, Inc. v. Ventrifex, Inc.*, 775 F.Supp. 1258, 1263 (N.D.Cal. 1991).

Moreover, in the "motion hearing" type of proceeding that was held, the Mirannes were, by definition,

unable to assert and defend their mortgage rights. Thus, they should not now be precluded from asserting those rights. *See D-1 Enterprises, Inc. v. Commercial State Bank*, 864 F.2d 36, 38 (5th Cir. 1989) ("Essential to the application of the doctrine of *res judicata* is the principle that the . . . claim to be precluded could have and should have been brought in the earlier litigation"); *Browning v. Navarro*, 887 F.2d 553, 558-559 (5th Cir. 1989). *See also Matter of Braniff Airways*, 783 F.2d 1283, 1289 (5th Cir. 1986) (" . . . if reasonable doubt exists as to what was decided in the first action, the doctrine of *res judicata* should not be applied").

As to the second point, none of the four Petitioners should have been held to have been parties to the Bankruptcy Court proceeding for claim preclusion purposes. Even though Petitioners Edmond G. Miranne and Edmond G. Miranne, Jr. appeared as creditors of the bankrupt estate, they cannot be held to have knowingly participated as parties in any proceeding that they knew could have resulted in the cancellation of their mortgage, because there was no adversary proceeding held, pursuant to Bankruptcy Rule 7001, that included adequate notice of the nature of such a proceeding.

Petitioners Rivet and Winer did not appear in the bankruptcy proceeding in any capacity, and were not represented by counsel. In order to include Rivet and Winer in the preclusive effects of the Bankruptcy Court order, the Fifth Circuit indulges in both a factual and legal presumption that Rivet's and Winer's respective husbands were representing the spouses' interests through the Louisiana doctrine of community property. App. 66-67 & nn. 48, 49. This was done without any basis in the Record to support the presumption.

Under Louisiana law, the presumption that a community property regime exists between spouses is defeated by the existence of a matrimonial or separate property agreement. La.Civ.Code Arts. 2328-2329, 2340, 2370, *et seq.* Thus, if such separate property agreements are in place, the spouses are completely separate juridical entities with respect to their respective property holdings. *Id.* at Arts. 2328, Comment (a); 2370 Comment (a). In this circumstance, a husband is as a complete stranger to his wife's property, and could only "speak for her" or bind her by his assertions if he had independent authority to do so, such as a written power of attorney or mandate. *Id.* at Art. 2328, Comment (b); Art. 2371; La.Civ.Code Art. 2997 A.

Thus, Rivet's entire construct regarding the female spouses is grounded on the unarticulated assumption of a fact not in the Record, *i.e.*, that there was no separate property agreement between either of the respective sets of spouses.¹⁵ The existence of such separate property agreements would mean, beyond any doubt, that at least Rivet and Winer did not receive adequate notice of the potential cancellation of their mortgage rights as is constitutionally required. *See Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798-799, 103 S.Ct. 2706, 2711, 77 L.Ed.2d 180 (1983). The existence of a community property regime was not raised by any party or by the District Court, before it appeared in the Fifth Circuit's opinion. Thus, Petitioners had no opportunity to rebut the presumption of community.

¹⁵ As a matter of fact, this was quite wrong. For a fuller discussion of the facts these Petitioners would have been able to prove, had they been advised of the existence of an issue in this regard, the attention of this Honorable Court is respectfully directed to note "8", herein.

Finally, because there was no adversary proceeding held in the Bankruptcy Court, and the procedures of § 363 of the Bankruptcy Code were not followed, the cancellation of Petitioners' property rights was not a proper part of the Bankruptcy Court order. The Fifth Circuit itself has consistently ruled that if the procedural rules of court made it impossible to raise a claim, then that claim is not precluded. *Browning v. Navarro*, 887 F.2d 553, 558 (5th Cir. 1989) ("It is black-letter law that a claim is not barred by *res judicata* if it could not have been brought.") Because the Bankruptcy Court did not follow the mandated procedure, all four Petitioners were unable effectively to contest the cancellation of their mortgage within the defective procedure that was followed. See *D-1 Enterprises, Inc. v. Commercial State Bank*, *supra*, 864 F.2d at 38. Just as was the case in *D-1 Enterprises*, the two Miranne Petitioners were unable adequately to present their claims in the "motion hearing" type of proceeding that was held. 864 F.2d at 38-39. See also *In re Salmanson*, 132 B.R. 547, 550 (Bkrtcy.N.D.Tex. 1991) (holding that the existence of a bankruptcy order did not preclude the subsequent presentation of issues that were not a part of that order).

The principal reason that Rule 7001 mandates an adversary hearing when substantive property rights, other than those of the debtor, are to be adjudicated is so that those property owners may be afforded due process of law. See, e.g., *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55-56, 114 S.Ct. 492, 502, 126 L.Ed.2d 490 (1993) ("The purpose of an adversary proceeding is to ensure the requisite neutrality that must inform all governmental decision making.") The foundation of due process is effective notice to the person whose substantive rights are to be affected. See *Mennonite Board of Missions v.*

Adams, 462 U.S. 791, 798-799, 103 S.Ct. 2706, 2711, 77 L.Ed.2d 180 (1983) ("Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending . . . sale.") At a minimum, without such a proceeding, it cannot be said that Petitioners Rivet and Winer received adequate notice of the pending sale of the subject property, within the meaning of *Mennonite*. This Court was clear in *Mennonite* about the kind of notice required:

Personal service or mailed notice is required. . . . Notice by mail or other means as certain to ensure actual notice is a minimum constitutional requirement to a proceeding which will adversely affect the liberty or property interests of *any party*, whether unlettered or well versed in commercial practice . . .

462 U.S. at 799-800, 103 S.Ct. at 2712 (emphasis by the Court). See also *Federal Savings & Loan Ins. Corp. v. Tri-Parish Ventures, Ltd.*, 881 F.2d 181, 182-184 (5th Cir. 1989) (holding, under Louisiana law, that, even though mortgagees received actual notice of executory process, the failure to serve them with "all notices" did not satisfy the requirements of due process).

Finally, the bankruptcy courts, other than in the Eastern District of Louisiana, have consistently held that when a bankruptcy court does not conduct an adversary proceeding to cancel a mortgage, but, as herein, holds only a "motion hearing," then the property is sold "subject to" the mortgage as a matter of law. See *In re Parrish*, 171 B.R. 138, 141 (Bkrtcy.M.D.Fla. 1994); *In re Wing*, 63 B.R. 83, 85 (Bkrtcy.M.D.Fla. 1986).

VII. Petitioners' state court lawsuit does not constitute a collateral attack on a federal judgment.

Because of the lack of removal jurisdiction, Petitioners' mortgage enforcement action, as well as the actual application of the doctrine of claim preclusion, is not properly before this Honorable Court. Nevertheless, because of the Fifth Circuit's notion that this claim is somehow a collateral attack on a federal judgment, Petitioners will briefly address this argument. Contrary to the Fifth Circuit's characterization, Petitioners' state court action to enforce their mortgage does not constitute a collateral attack on the Bankruptcy Court order. In fact, Respondents chose not to enforce, and thus waived, any right they may have had to enforce that order against Petitioners' mortgage. As will be shown, no collateral attack was necessary, because the Bankruptcy Court order, when entered, did not order (and could not have ordered) the actual erasure of the mortgage, and Respondents did not enforce the order so as to accomplish that result.

At the outset, Petitioners' mortgage was not erased by the Bankruptcy Court order. It is well settled that "[t]he Tenth Amendment gives to the State the exclusive right to legislate concerning the lands within her borders . . ." *Sunderland v. United States*, 266 U.S. 226, 227 (1924); *United States v. Fox*, 4 U.S. 315, 320 (1876). It is equally well settled that all federal courts, including most pointedly bankruptcy courts, are courts of limited jurisdiction. See *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 87, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982). Their jurisdiction is strictly limited by their Congressional grant of authority. See *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 116 S.Ct. 494, 497-498, 133 L.Ed.2d 461 (1995). Because of these limitations on its

authority, the Bankruptcy Court could not, and indeed did not purport to, order the State of Louisiana to erase Petitioners' collateral mortgage.¹⁶

Louisiana is a record notice jurisdiction. *McDuffie v. Walker*, 51 So. 100 (La. 1909). Thus, Respondents and their attorneys are conclusively presumed to have been aware of the existence and recordation of the mortgage at the time of the sale to FSA. *Id.* This also means that the recordation of a mortgage in Louisiana is an official act of the State, La.Civ.Code Arts. 3342-3348, and that the Parish Recorder of Mortgages is an officer of the State. La.Civ.Code Arts. 3386-3396.¹⁷ In Louisiana, as long as a mortgage is recorded and not erased, that mortgage is

¹⁶ The previous section demonstrated that the Bankruptcy Court order was not effective to extinguish Petitioners' mortgage rights *vis-a-vis* Respondents. This section will assume, *arguendo*, that the Bankruptcy Court order was effective, when entered, as between Petitioners and Respondents. This section will demonstrate, however, that, whatever rights Respondents may have possessed when the order was entered, they waived and forfeited those rights by their implicit choice not to execute the Bankruptcy Court order, or to engage in supplementary proceedings to enforce their rights under that order, for more than eleven years. In a nutshell: They had a judgment. They didn't enforce it. They waited too long. Now, they can't enforce it.

¹⁷ The Articles of the Louisiana Civil Code cited in this section were amended, renumbered, and, in some cases, redesignated as sections of Title 9 of the Louisiana Revised Statutes by Act 631 of 1991 and Act 1132 of 1992, both of which became effective on January 1, 1993. These acts provide that mortgages and privileges created prior to January 1, 1993 continue to be regulated by the law in effect prior to that date. Accordingly, where there has been a change, the relevant Louisiana Law will be cited in this section as it was designated prior to January 1, 1993.

exclusively presumed to exist in the eyes of the State. La.Civ.Code Arts. 3345, *et seq.*; *Phillips v. Parker*, 483 So.2d 972, 975 (La. 1986). This, the so-called "public records doctrine", both requires the inspection of the mortgage rolls to ascertain what encumbrances exist against a particular parcel of property, and at the same time, protects all persons in their reliance on the mortgage rolls. *Matter of De La Vergne*, 156 B.R. 773 (Bkrtcy.E.D.La. 1993). All persons are conclusively presumed to have notice of the existence of all mortgages recorded on the mortgage rolls. *Id.*

Respondents argued below that the Bankruptcy Court order somehow erased Petitioners' mortgage by operation of law. Respondents' argument appears to be that, because of the existence of the Bankruptcy Court order, which Respondents interpreted to be in their favor, they were thus conclusively entitled to ignore the State's mortgage recordation law and procedure, even to the point of passing title in a multi-million-dollar sale of real estate located in Louisiana in the face of a good and valid mortgage recorded against it, without getting the mortgage erased. To accept such an argument would constitute a usurpation of Louisiana's right to control the land within its borders, in clear violation of the Tenth Amendment. The Bankruptcy Court order did not purport to affect, by operation of law, Petitioners' mortgage on the rolls of Orleans Parish, nor could it have done so.

The Orleans Parish Recorder of Mortgages was not before the jurisdiction of the Bankruptcy Court. Louisiana law is clear that the Recorder of Mortgages is the *only* person who may officially erase a Louisiana mortgage. La.Civ.Code Arts. 3371-3385; 3386-3396; La.Rev.Stat. § 9:5251. The Record herein discloses that the Recorder

was not served with process and brought before the Bankruptcy Court. It is indeed axiomatic that, before any federal court may exercise personal jurisdiction over any person, the procedural requirement of service of process must be satisfied. *Omni Capital International v. Rudolf Wolf & Co., Ltd.*, 484 U.S. 97, 104, 108 S.Ct. 404, 409, 98 L.Ed.2d 415 (1987); *J. O. Alvarez, Inc. v. Rainbow Textiles, Inc.*, 168 F.R.D. 201, 202-203 (S.D.Tex. 1996). Without the presence of the Recorder of Mortgages, the Bankruptcy Court *could not* have ordered the erasure of Petitioners' mortgage.

Even if the Bankruptcy Court had followed the correct procedure and afforded all Petitioners due process through an adversary proceeding, the most that the Bankruptcy Court order gave Respondents was a personal right to enforce that order through the procedures provided by the State of Louisiana for the erasure of mortgages, as codified in La.Civ.Code Arts. 3371-3385. This is clear from the federal statutory scheme mandating the enforcement of federal judgments through the enforcement machinery of the state in which the judgment is to be enforced. See, e.g., Fed.R.Civ.P. 69, *et seq.*; Fed.R.Bkrtcy.Proc. 7069, *et seq.*; *Matter of Kassuba*, 10 B.R. 309, 310 (S.D.Fla. 1981). While it is true that most of the federal rules and precedents concerning the enforcement of judgments deal with money judgments, the obligation to use the State procedure to enforce a judgment should have even more force with respect to the erasure of a mortgage on real property.¹⁸

¹⁸ Moreover, Fed.R.Bkrtcy.Proc. 7070, by its terms, applies *only* in adversary proceedings. It is undisputed that no such proceeding was held in the Bankruptcy Court, and no order contemplated by Rule 7070 was issued by the Bankruptcy Court.

When Regions Bank bought the subject property on June 17, 1986, or at the latest when the sale was confirmed by the Bankruptcy Court order on August 14, 1986, it became incumbent upon Regions Bank to follow the Louisiana procedure for the erasure of a mortgage. See *Ralph Slovenko, Treatise on Creditors' Rights Under Louisiana Civil Law*, Claitor's Pub. Div., at 773-798 (1968); *Matthews v. Guillot*, 544 So.2d 723 (La.App. 3rd Cir. 1989). It is undisputed that this was not done, and that, so far as the Record before this Court discloses, Respondents have completely ignored, and will continue to ignore, the State of Louisiana and its orderly procedure assuring proper recordation of real property interests. Respondents have done nothing to enforce the Bankruptcy Court order which they now claim to have been somehow self-enforcing by operation of law. In fact, Louisiana provides a sophisticated, detailed, and specific procedure for the erasure of a mortgage, by someone other than the mortgagee, who claims to have a legally cognizable right to have the mortgage erased.

By way of introduction to this State's procedure, La.Rev.Stat. § 9:5251 provides, in pertinent part, as follows:

No conventional or judicial mortgage shall be cancelled, removed from the public records, or in any manner affected by any public or private sale of property subject thereto in any succession, liquidation, insolvency, receivership, bankruptcy, or partition proceeding. . . .

Louisiana Law also provides that a mortgage shall not be erased as the result of the discharge in bankruptcy of the mortgagor. *Socony Mobil Oil Co., Inc. v. Burdette*, 309 So.2d 655, 656-657 (La. 1975); *Ferguson v. Porter*, 359 So.2d 676 (La.App. 1st Cir. 1978). See also *Property Asset Management*

v. Pirogue Cove Apts., 693 So.2d 1217 (La.App. 4th Cir. 1997) (holding that a mortgage, as an accessory obligation, is enforceable, whether or not the mortgagor is personally responsible for the obligation the mortgage secures).

The principal effect of these provisions is that the holder of a personal judgment – which is the most that Respondents may be said to have had as against Petitioners – cannot simply present that judgment, *ex parte*, to the Recorder of Mortgages and compel the Recorder to erase the mortgage with no notice to the mortgagee. See *Cheleno v. Selby*, 538 So.2d 706, 707 (La.App. 4th Cir. 1989), citing, *People's Homestead & Savings Ass'n v. Worley*, 191 La. 453, 185 So. 880 (1939) ("Inscription of mortgage can only be erased by the consent of the parties or by a judgment decreeing such erasure.")¹⁹ A personal judgment is not self-enforcing so as to affect property rights by operation of law; it may affect such rights only if and when it is actually enforced. Thus, the person seeking to erase a mortgage is mandated to invoke the procedures of La.Civ.Code Arts. 3371-3385.

Because of La.Rev.Stat. § 9:5251, the Recorder of Mortgages *may not* erase a mortgage on the strength of a bankruptcy order or sale alone. Thus, Respondents could not have enforced the Bankruptcy Court order by convoking a summary *mandamus* proceeding against the Recorder alone. At a minimum, erasure of the mortgage

¹⁹ In this light, this procedure may be seen to embody the legislative concern that the State of Louisiana make sure, in its own right, that the required due process has been afforded, before it erases the substantive property rights of a mortgagee.

would have required the convocation of an ordinary proceeding, naming as defendants both the Recorder and Petitioners (as mortgagees), and relying on the determination of rights by the Bankruptcy Court order, as between Petitioners and Respondents. This would have accomplished at least two necessary objectives: First, because the Recorder would have been brought before the Court, such a proceeding could have resulted in a personal judgment against the Recorder ordering him – as the only person who can do so under Louisiana law – to erase the mortgage. Second, in such an ordinary proceeding, Petitioners would have undeniably received notice of the potential cancellation of their property rights, and would have been able to present any defenses they may have had to the enforcement of the Bankruptcy Court order, e.g., that the Bankruptcy Court did not hold an adversary proceeding and did not afford all Petitioners the required *Mennonite* notice. See *Federal Savings & Loan Ins. Corp. v. Tri-Parish Ventures, Ltd.*, 881 F.2d 181, 182-184 (5th Cir. 1989).

Finally, it is undisputed herein that Respondents took no steps whatsoever to enforce any rights they may have had under the Bankruptcy Court order. It is also undisputed that: (1) the mortgage remained duly recorded at the time of the sale in question; (2) the mortgage was re-inscribed by the Recorder of Mortgages after the sale; and (3) the mortgage remains duly recorded to this day. Respondents' right to invoke the erasure procedure of the State of Louisiana accrued no later than August of 1986. Louisiana law also provides that the right to invoke this procedure prescribes in ten years. La.Civ.Code Art. 3499 (formerly Art. 3544); Yiannopolis, *Civil Law Property*, 3rd Ed., § 250 at 488 (West 1991). Moreover, it is clear as a

matter of federal law that the right to enforce a federal judgment may not extend beyond the time provided by the law of the state in which the judgment is to be enforced. See *United States v. Fiorella*, 869 F.2d 1425, 1426 (11th Cir. 1989).

Thus, after August of 1996, neither Regions Bank, nor FSA as its successor in interest, had any right to erase the mortgage, and this is true as a matter of Louisiana law, regardless of any right that Regions Bank may or may not have had in August of 1986. Regions Bank and its successors lost any rights they may have had by their evident choice not to avail themselves of those rights. If the position adopted herein by Regions Bank is ultimately sustained, it would mean that the mortgage could in theory remain recorded against the property forever, and only those with whom Regions Bank or FSA deign to share knowledge of the Bankruptcy Court order would be aware that the mortgage really does not exist. This selectively enlightened group would apparently not include the Recorder of Mortgages of Orleans Parish or any other official of the State of Louisiana. See *Amoskeag Bank v. Chagnon*, 133 N.H. 11, 572 A.2d 1153 (1990) (discussing the necessity to maintain the integrity of the public records). To sustain Respondents position would effectively create a federal property court and a federally supervised mortgage recordation system. Such a result would constitute an unwarranted intrusion against the sovereign right of a state to control the real property within its borders.

CONCLUSION

For the reasons assigned above, the opinion of the United States Court of Appeals for the Fifth Circuit in *Rivet v. Regions Bank of Louisiana*, 108 F.3d 576 (5th Cir. 1997), should be reversed, and this civil action should be ordered to be remanded to the Civil District Court for the Parish of Orleans, State of Louisiana.

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In The

CLERK

Supreme Court of the United States

October Term, 1997

MARY ANNA RIVET, MINNA REE WINER, EDMOND
G. MIRANNE and EDMOND G. MIRANNE, JR.,

Petitioners,

versus

REGIONS BANK OF LOUISIANA, WALTER L.
BROWN, JR., PERRY S. BROWN and
FOUNTAINBLEAU STORAGE ASSOCIATES

Respondents.

On Writ Of Certiorari To The
Fifth Circuit Court Of Appeals

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QUESTION PRESENTED

Where a claim, filed in state court and asserted by plaintiffs to arise solely under state law, is precluded by a prior federal judgment on a matter of federal law, can the case be removed from state court on the ground that the purported state law claim is in fact an artfully pleaded federal one?

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RESPONDENTS' BRIEF ON THE MERITS

Respondents, Fountainbleau Storage Associates, Regions Bank of Louisiana, Walter L. Brown, Jr. and Perry S. Brown, request that this Court affirm the decision of the Fifth Circuit Court of Appeals dismissing petitioners' claims against them with prejudice.

STATEMENT OF THE CASE**I. Introduction**

The petitioners filed an action in Louisiana state court seeking to foreclose upon a mortgage nearly a decade after the entry of two bankruptcy court orders, from which no appeal ever has been taken, authorizing and subsequently confirming the sale of certain property "free and clear" of the same mortgage. R. 4-75; Jt. App. 12-34. Although petitioners were aware of the bankruptcy court orders and of the sale made in accordance with their provisions, their state court pleadings deliberately avoided any reference to the bankruptcy proceedings. In response to petitioners' attempt to relitigate in state court a matter already tried to and the subject of two final orders of the bankruptcy court, the defendants in the state court suit removed the matter to federal district court pursuant to 28 U.S.C. § 1441(b) under the authority of *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981). Both the district court and the court of appeals held that removal was proper under *Moitie* and that the suit should be dismissed under principles of claim preclusion in light of the bankruptcy court orders. This Court granted certiorari to review whether the case had been properly removed, the only issue presented by the petition for certiorari.

II. Statement of Facts

In 1957 Lois Stern leased a tract of property located in New Orleans, Louisiana to Pelican State Hotel Corp. R. 484. Pelican's interest in the lease ("Leasehold Estate")¹ was transferred on several occasions, finally being acquired by Tulane Hotel Investors Limited Partnership ("THILP") on September 15, 1983. R. 484-85. On the same date THILP granted a mortgage ("First Mortgage") on the Leasehold Estate to secure a \$15,000,000 collateral mortgage note, which in turn had been pledged to secure a loan from First Financial Bank ("FFB").² R. 504; Jt. App.

¹ As the Fifth Circuit noted, the term "leasehold estate" is foreign to a civil law jurisdiction such as Louisiana. *Rivet v. Regions Bank of Louisiana*, F.S.B., 108 F.3d 576, 580 n. 2 (5th Cir. 1997); Jt. App. 50 n. 2. Nonetheless, it has been used throughout this proceeding to refer to the rights granted to the lessee under the 1957 lease and has been adopted by the petitioners in their brief. Pet. Brief 5 n. 4. Respondents will follow that convention in this brief.

² The collateral mortgage package is a security device unique to Louisiana, with its origins in the Louisiana Civil Code. The collateral mortgage secures a collateral mortgage note, which in turn is pledged to secure an underlying loan, often represented by negotiable instruments ("handnotes") executed in connection with loan advances. The collateral mortgage note does not evidence the money advanced by the lender, but is a part of the package securing the advances represented by the handnotes. Thus, the holder of a collateral mortgage note may neither collect any funds from the borrower nor foreclose upon the collateral mortgage unless there is money owing on the underlying debt. *First Guaranty Bank v. Alford*, 366 So. 2d 1299, 1302-03 (La. 1978). See generally David S. Willenzik, *Future Advance Priority Rights of Louisiana Collateral Mortgages: Legislative Revisions, New Rules, and a Modern Alternative*, 55 La. L. Rev. 1 (1994); Max Nathan, Jr. and Anthony Dunbar, *The Collateral Mortgage: Logic and Experience*, 49 La. L. Rev. 39 (1988).

16. A few months later, on May 2, 1984, THILP granted a second collateral mortgage ("Second Mortgage") on the Leasehold Estate to secure a \$5,000,000 collateral mortgage note held by the petitioners, Edmond G. Miranne, Edmond G. Miranne, Jr., Mary Anna Rivet and Minna Ree Winer (collectively, "the Mirannes").³ R. 511-18. Edmond G. Miranne, Jr. was a limited partner in THILP, holding a 71.5% interest in the partnership. R. 345.

THILP filed a petition for relief under Chapter 11 of the Bankruptcy Code on October 5, 1984 in the United States Bankruptcy Court for the Eastern District of Louisiana. The THILP bankruptcy later was converted to a Chapter 7 proceeding, and a trustee was appointed. R. 519-20. In the spring of 1986 the trustee applied for bankruptcy court authority pursuant to 11 U.S.C. § 363(f) to sell the Leasehold Estate free and clear of all liens, including the Second Mortgage. In response to the application, the bankruptcy court issued an order dated April 18, 1986 advising all creditors and parties in interest opposing the sale to serve objections on the trustee by June 12, 1986 and setting a hearing on any objections that might be filed for June 16, 1986. Jt. App. 10-11. At the hearing, which was held as scheduled after "all creditors and parties in interest [had] been given the required notice [and] opportunity to object . . . , " Edmond G. Miranne, Jr. appeared as attorney for himself and his father. Jt. App. 12-13. On June 17, 1986, the day following the hearing, the bankruptcy court executed an order granting the sale application, stating expressly that the

³ Mary Anna Rivet is married to Edward G. Miranne, and Minna Ree Winer is married to Edmond G. Miranne, Jr.

sale would be free and clear of the Second Mortgage. Jt. App. 13, 18.⁴

Although petitioners assert now that the procedure followed by the bankruptcy court in issuing the sale order was improper, Pet. Brief 6,⁵ neither they nor any other interested party appealed from that order. On August 11, 1986, after expiration of the delays for appeal, the bankruptcy trustee held a public auction at which FFB, holder of the First Mortgage, submitted the only bid. The bankruptcy court approved the auction results and, by order dated August 14, 1986, directed that the sale proceed "free and clear of any and all liens and encumbrances" and ordered the Recorder of Mortgages for Orleans Parish to "cancel and erase all liens, mortgages and encumbrances bearing against the said property . . .," including the Second Mortgage in favor of the Mirannes. Jt. App. 27-28, 32.⁶ Pursuant to the August 14,

⁴ The Second Mortgage was listed on Exhibit D to the sale order as Item 29, where it was described as "Collateral Mortgage in the principal amount of \$5,000,000, before J.F. Quaid, Notary Public, recorded at MOB 2469, Folio 3 on August 17, 1984." Jt. App. 18. A delay in recordation apparently accounts for the discrepancy between the August 17, 1984 date contained in this description and the May 2, 1984 date found on the face of the mortgage. R. 5.

⁵ More specifically, they assert that the bankruptcy court should have required the trustee to institute an adversary proceeding pursuant to Fed. R. Bankr. P. 7001, *et seq.*, instead of allowing the trustee to proceed by motion under Fed. R. Bankr. P. 9013-14. The legal issues relating to this contention, which is both untimely and incorrect, are discussed *infra* at Section II(A)(2), pp. 40-42.

⁶ For reasons that are unclear, the Recorder of Mortgages never has canceled the Second Mortgage from the public records. His failure to do so is of no moment if, as respondents

1986 order, from which, as with the June 17, 1986 order, no appeal ever was taken, the trustee formally conveyed the Leasehold Estate to FFB. R. 501-10.

Secor Bank eventually succeeded FFB as owner of the Leasehold Estate. On December 28, 1993 it acquired the underlying property from Walter L. Brown, Jr. and Perry S. Brown ("the Browns"), successors-in-interest to the original lessor, thereby extinguishing the lease as a matter of law. La. Civ. Code Ann. art. 1903. Later that day Secor conveyed the property in full ownership to Fountainbleau Storage Associates ("FSA"), its current owner. R. 181-85. Regions Bank of Louisiana ("Regions") is the successor to Secor.

III. The Proceedings Below

A year after FSA acquired the property, the Mirannes brought suit in Louisiana state court against FSA, Regions and the Browns, alleging that the December 1993 transactions, by canceling the lease and conveying the

contend, the mortgage has been rendered ineffective by the bankruptcy court orders, since recordation does not create any rights under Louisiana law. E.g., *Gibraltar Sav. F.A. v. First Mortg. Corp.*, 825 F. Supp. 746, 749 (M.D. La. 1993); *First Nat. Bank of Ruston v. Mercer*, 448 So. 2d 1369, 1376 (La. App. 2d Cir. 1984). Petitioners suggest at various points in their brief that the continued presence of the Second Mortgage on the public records of Orleans Parish somehow gives it independent life as a valid encumbrance against the property, notwithstanding contrary language in the bankruptcy court orders. Pet. Brief 7, 12-13, 42-49. That suggestion is completely at odds with Louisiana law, under which a mortgage is purely an accessory security interest, with no existence independent from an underlying principal obligation. La. Civ. Code Ann. arts. 3278-79, 3282. This point is discussed in more detail *infra* at Section II(B), pp. 47-49.

property, had prejudiced their rights under the Second Mortgage. R. 4-12. The Mirannes made no reference in their state court pleadings to the 1986 bankruptcy court orders that, on their face, provided that the Second Mortgage ceased to encumber the property after August 14, 1986. Instead, alleging that the Second Mortgage was a currently valid encumbrance and implicitly treating it as unaffected by the bankruptcy court orders, they prayed for its recognition and enforcement against FSA's property or, alternatively, for damages. *Id.*

The respondents removed the state court action to the United States District Court for the Eastern District of Louisiana pursuant to 28 U.S.C. § 1441(b), asserting that petitioners' claims in fact arose under federal law, including 11 U.S.C. § 363(f), notwithstanding the deliberate omission of any reference to federal law in petitioners' state court pleadings. R. 117-21. Following removal, respondents sought summary judgment on the basis of, *inter alia*, claim preclusion, while the Mirannes moved that the case be remanded to state court for lack of subject matter jurisdiction. R. 403-08, 420-602. Relying primarily upon *Carpenter v. Wichita Falls Indep. School Dist.*, 44 F.3d 362 (5th Cir. 1995), the district court denied the motion to remand, granted summary judgment in favor of FSA and Regions on the basis of claim preclusion, and granted summary judgment in favor of the Browns on other grounds. Jt. App. 38-47.

The Fifth Circuit affirmed. *Rivet v. Regions Bank of Louisiana, F.S.B.*, 108 F.3d 576 (5th Cir. 1997); Jt. App. 48-90. After reviewing the doctrine of artful pleading, particularly as it has been applied in instances of claim preclusion, the court of appeals held that this Court's decision in *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981), authorized

removal on federal question grounds "where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law." *Id.*, 108 F.3d at 586 (quoting *Carpenter*, 44 F.3d at 370); Jt. App. 64. It found support for this jurisdictional rule in decisions from the Seventh and Ninth Circuits, which reasoned that under such circumstances the state court claim could be recharacterized as the original federal claim against which the prior judgment had been entered. *Id.*, 108 F.3d at 585-86, 591-92; Jt. App. 61-65, 77-79.⁷ After articulating the applicable jurisdictional standard, the Fifth Circuit determined that the 1986 orders of the bankruptcy court precluded the Mirannes' lawsuit, which it characterized as a "transparent, 'second bite' collateral attack" on those orders, thus justifying both removal of the case and summary judgment dismissing it. *Id.*, 108 F.3d at 586-89, 592-93; Jt. App. 65-73, 81-82.⁸

⁷ The Seventh and Ninth Circuit decisions cited by the court of appeals in support of this proposition include *Clinton v. Acequia, Inc.*, 94 F.3d 568, 571 (9th Cir. 1996); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 912 (7th Cir. 1993); *Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 908 F.2d 477, 480 (9th Cir. 1990); *Ultramar America Ltd. v. Dwelle*, 900 F.2d 1412, 1415 (9th Cir. 1990); *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1403 (9th Cir. 1988); and *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368, 1374-76 (9th Cir.), cert. denied, 484 U.S. 850, 108 S. Ct. 150, 98 L. Ed. 2d 106 (1987).

⁸ Although it found res judicata inapplicable to the claims against the Browns, the Fifth Circuit held that it could exercise supplemental jurisdiction over those claims under 28 U.S.C. § 1337. It affirmed the grant of summary judgment in favor of the Browns because of the Mirannes' failure to establish any legal basis or triable issue of fact to support a claim against them. 108 F.3d at 592-93; Jt. App. 80-82. The Mirannes now concede that they have no personal claim against the Browns. Pet. Brief 4.

Judge Jones dissented. While agreeing generally with the majority's interpretation of *Moitie*, she asserted that removal was improper in this instance because, from her perspective, the Mirannes had no "essentially federal" claim from the earlier bankruptcy proceeding to recharacterize. *Id.*, 108 F.3d at 593-95; Jt. App. 83-89. Judge Jones viewed the petitioners' claim, "whether [they] proceeded in good faith or not," as purely a state law matter that should have been remanded to state court. *Id.*, 108 F.3d at 595; Jt. App. 89.

The Fifth Circuit rejected the Mirannes' request for *en banc* consideration. 114 F.3d 1185 (5th Cir. 1997). The Mirannes then filed a petition for writ of certiorari to this Court directed to the jurisdictional issue. The Court granted certiorari by order dated September 29, 1997. ___ U.S. ___, 118 S. Ct. 31, ___ L. Ed. 2d ___ (1997).

SUMMARY OF ARGUMENT

The scope of statutory federal question jurisdiction under 28 U.S.C. § 1331 and its companion removal provision, 28 U.S.C. § 1441, is narrower than the constitutional grant, which covers any suit that necessarily raises questions of substantive federal law at its outset. Statutory "arising under" jurisdiction is determined from the allegations of the plaintiff's well pleaded complaint. Thus, a federal defense to a claim grounded in state law does not confer federal jurisdiction, nor do allegations in a plaintiff's complaint made in an attempt to avoid or anticipate a federal defense. Instead, a suit arises under federal law for jurisdictional purposes only if there appears on the face of the complaint a substantial disputed question of federal law. As master of his complaint, a plaintiff therefore can avoid federal jurisdiction by choosing to base his action solely on state law, even if the allegations of the complaint could support a claim under federal law.

The Court has developed an "independent corollary" to the well-pleaded complaint rule when a plaintiff's claim, although it purports to be based solely on state law, necessarily arises under federal law. This "independent corollary" has been developed primarily in the context of federal preemption. In a series of four decisions – *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557, 88 S. Ct. 1235, 20 L. Ed. 2d 126 (1968); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987); and *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987) – the Court has held that under some circumstances the preemptive force of federal law displaces any conceivable state cause of action that a plaintiff may seek to assert, making the plaintiff's cause of action necessarily a federal one. In these circumstances, often described as "complete preemption," plaintiff's purported cause of action can be recharacterized as a federal (and hence removable) claim.

The Court's decision in *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981), authorizes removal on similar "artful pleading" grounds when a state court action is precluded by a prior federal judgment on a matter of federal law. In such instances any and all state law claims that were or could have been asserted in the prior federal proceeding have been extinguished – i.e., they have merged into the federal judgment and disappeared, leaving nothing upon which to base a suit in state court. Any purported state law claims filed in a subsequent state court action thus can be recharacterized as the same federal claim against which the federal judgment previously had been entered and, thus recharacterized, can be removed.

This case fits within the “artful pleading” rule established by *Moitie*. Petitioners triggered a contested proceeding before the bankruptcy court by objecting to the trustee’s proposed sale of the Leasehold Estate “free and clear.” In that proceeding they asserted that they had a valid mortgage against the property that the trustee wished to sell and litigated unsuccessfully whether, under 11 U.S.C. § 363(f), their mortgage would survive the public sale. Petitioners’ current effort to foreclose upon that very mortgage can be recharacterized, in light of the merger and bar effects of claim preclusion, as a reenactment in state law garb of the contested proceeding generated by their sale objection before the bankruptcy court. Thus recharacterized, it becomes removable.

The jurisdiction rule of *Moitie*, as applied in cases such as the instant one, promotes substantial federal interests in the uniform operation of federal law and the integrity of the federal court system. It prevents manipulation of the dual court systems by a party unhappy with the outcome of federal court litigation and is consistent with the principles of federalism enunciated in decisions such as *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), particularly since injunctive relief, a far greater intrusion upon the sovereignty of state courts than removal, is available in instances of both claim and issue preclusion under the relitigation exception to the Anti-Injunction Act. Moreover, to the extent that *Moitie* authorizes a federal court to consider an aspect of the merits to determine its jurisdiction, it is no different from many of this Court’s other jurisdictional holdings, which, in areas such as complete preemption, fraudulent joinder and the amount in controversy, require extensive consideration of merits issues as a component of the jurisdictional determination.

Petitioners’ claims are barred by the prior bankruptcy court orders, establishing that both the exercise of removal jurisdiction and the ultimate grant of summary judgment in favor of respondents were proper. The bankruptcy court had jurisdiction over the contested proceeding generated by the objection to the trustee’s sale application, and its orders must be treated as final judgments for res judicata purposes. Two of the petitioners participated by name in the bankruptcy proceeding, and they adequately represented the other petitioners’ (in fact, their wives’) interests, which were identical to their own. The petitioners’ claims in the two proceedings each arise from the same “transaction,” as that term has been defined for res judicata purposes, since the viability and enforceability of the Second Mortgage lies at the heart of both. Finally, the continued presence of the Second Mortgage on Louisiana’s public records is irrelevant to the claim preclusion inquiry, since recordation is not a source of substantive rights under Louisiana law, but of notice only, and hence cannot undo the preclusive effect of the bankruptcy court’s orders.

ARGUMENT

- I. A Federal District Court Has Removal Jurisdiction Over a Lawsuit Asserting Claims Purportedly Based Solely on State Law If Those Claims Are Barred By a Prior Federal Judgment On a Question of Federal Law
 - A. Federal Question Removal Jurisdiction Must Be Determined Based Upon the Allegations of the Plaintiff’s Well-Pleaded Complaint

Article III, Section 2 of the Constitution extends the judicial power of the United States to all cases “arising under this Constitution, the Laws of the United States,

and Treaties made, or which shall be made, under their Authority." In an early decision written by Chief Justice Marshall, the Court interpreted this constitutional grant of "arising under" jurisdiction expansively.

[I]t [is] a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law[s] of the United States, and sustained by the opposite construction. . . .

Osborn v. Bank of U.S., 22 U.S. (9 Wheat.) 738, 822, 6 L. Ed. 204 (1824). More recently the Court has reaffirmed that Article III "arising under" jurisdiction covers any suit that "necessarily raises questions of substantive federal law at the very outset. . . ." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493, 103 S. Ct. 1962, 1971, 76 L. Ed. 2d 81 (1983).

Despite this broad grant of constitutional authority, Congress, with one short-lived exception,⁹ did not grant the lower federal courts original jurisdiction over civil actions "arising under" federal law until 1875. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. The language of the 1875 act, insofar as it concerns the original jurisdiction of the federal trial courts, has changed little to the present day, where it currently is embodied in 28 U.S.C. § 1331.¹⁰

⁹ The exception was contained in the so-called "Midnight Judges Act," which granted the lower courts the power to hear cases commensurate with the constitutional grant. Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92. It was repealed a year later. Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132.

¹⁰ The 1875 act gave federal trial courts original jurisdiction over "all suits of a civil nature . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority . . . , provided that the amount in controversy exceeded \$500. Act of Mar. 3, 1875, ch. 137, § 1, 18

Initially the Court construed the statutory language quite expansively, much as it previously had construed the constitutional provision from which the statutory phrasing had been adapted. For example, the opinion in *Robinson v. Anderson*, 121 U.S. 522, 524, 7 S. Ct. 1011, 1012, 30 L. Ed. 1021 (1887), suggested that a defense grounded upon federal law would sustain jurisdiction under the 1875 act. A year later, in *Metcalf v. City of Watertown*, 128 U.S. 586, 588-89, 9 S. Ct. 173, 174, 32 L. Ed. 543 (1888), Justice Harlan, writing for the Court, implied that a complaint that anticipated a federal defense, but that did not otherwise raise a federal issue, could fall within the scope of statutory "arising under" jurisdiction.

In the end, however, the Court recognized that the statutory grant of federal question jurisdiction, as opposed to the constitutional grant, must be "construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379, 79 S. Ct. 468, 484, 3 L. Ed. 2d 368 (1959). Accordingly, beginning with its opinion in *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 14 S. Ct. 654, 38 L. Ed. 511 (1894), the Court has developed a set of limiting principles that have narrowed the scope of the statutory grant of "arising under" jurisdiction. See *Verlinden*, 461 U.S. at 495, 103 S. Ct. at 1972 (constitutional "arising under" grant broader than statutory grant under 28

Stat. 470. The jurisdictional grant in the current version of 28 U.S.C. § 1331 covers "all civil actions arising under the Constitution, laws, or treaties of the United States" and does not require a minimum amount in controversy.

U.S.C. § 1331). These limiting principles establish the general framework within which the instant case must be evaluated.

The foundation of that general framework has been dubbed the "well-pleaded" complaint rule:

[W]hether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.

Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10, 103 S. Ct. 2841, 2846, 77 L. Ed. 2d 420 (1983) (quoting *Taylor v. Anderson*, 234 U.S. 74, 75-76, 34 S. Ct. 724, 724, 58 L. Ed. 1218 (1914)). Thus, the existence of a federal defense to a state law claim does not confer federal jurisdiction. *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 840-41, 109 S. Ct. 1519, 1521, 103 L. Ed. 2d 924 (1989). Moreover, notwithstanding suggestions to the contrary in *Robinson* and *Metcalf*, the lower federal courts lack jurisdiction over a case in which the complaint states a cause of action solely under state law, but further asserts either that federal law deprives the defendant of a defense that he might raise or that a purported federal defense is insufficient to defeat the claim. *Franchise Tax Bd.*, 463 U.S. at 10, 103 S. Ct. at 2846. This is so even if the only question presented for decision is raised by a federal defense. *Id.*, 463 U.S. at 12, 103 S. Ct. at 2847-48. Instead, a suit arises under federal law for purposes of 28 U.S.C. § 1331 only "if there appears on the face of the complaint

some substantial, disputed question of federal law." *Carpenter v. Wichita Falls Indep. School Dist.*, 44 F.3d 362, 366 (5th Cir. 1995).¹¹

Closely related to the well-pleaded complaint rule is the precept that the plaintiff is the master of his complaint. *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S. Ct. 410, 411, 57 L. Ed. 716 (1913). The party who brings a suit determines the law upon which he will rely and can decide to forego a claim based upon federal law in favor of causes of action founded entirely upon state law. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 2429, 96 L. Ed. 2d 318 (1987); see also *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 n. 6, 106 S. Ct. 3229, 3233 n. 6, 92 L. Ed. 2d 650 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced").

The same principles apply to federal question removal jurisdiction. Since 1887 a defendant has been able to remove an action from state court on federal question grounds only if the case is one that could have been brought originally in federal court. 28 U.S.C. § 1441.¹² A plaintiff thus generally may defeat removal by

¹¹ A case can arise under federal law, even if the only claims stated are grounded upon the law of a state, "where the vindication of a right under state law necessarily turn[s] on some construction of federal law. . . ." *Franchise Tax Bd.*, 463 U.S. at 9, 103 S. Ct. at 2846. This branch of "arising under" jurisdiction is not implicated by the instant case.

¹² The present version of § 1441 is closely derived from Act of Mar. 3, 1887, ch. 373, 24 Stat. 552 (corrected by Act of Aug. 13, 1888, ch. 866, 25 Stat. 434). See Charles A. Wright, *Law of Federal Courts*, § 38, at 224 (1994). The 1875 statute that created original federal question jurisdiction had authorized removal if either party claimed a right under the Constitution or laws of the

choosing to base his action solely upon state law, even if the allegations of the complaint could support a claim under federal law. *Caterpillar*, 482 U.S. at 392, 107 S. Ct. at 2429. Moreover, just as a plaintiff may not invoke original federal jurisdiction on the basis of an anticipated federal defense, a defendant may not remove an action from state court based upon an actual federal defense. *Oklahoma Tax Commission*. Only if the plaintiff, to secure the relief that he seeks, will be required to "establish both the correctness and the applicability to his case of a proposition of federal law," *Franchise Tax Bd.*, 463 U.S. at 9, 103 S. Ct. at 2846 (quoting P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *The Federal Courts and the Federal System* 889 (2d ed. 1973)), can the defendant remove the case to federal court.

B. This Court Has Developed an "Independent Corollary" To the Well-Pleaded Complaint Rule Authorizing the Federal Courts to Exercise Removal Jurisdiction When, As In the Instant Case, a Plaintiff's Claim Necessarily Arises Under Federal Law

1. Removal is Authorized Under Section 1441 When a Plaintiff's Purported State Law Claim Has Been Completely Preempted By Federal Law and Hence Can Be Recharacterized As a Federal Claim

The general framework discussed in the preceding section resolves the jurisdictional issue in the great majority of cases with little or no difficulty. However, the

United States. *Union & Planters' Bank*, 152 U.S. at 460, 14 S. Ct. at 656.

surface clarity of the cited jurisdictional principles dissolves in close cases, particularly those where the interplay between state and federal law makes the boundary between the two difficult to discern. To address these more difficult cases, the Court has developed an "independent corollary" to the well-pleaded complaint and master of the complaint rules – "a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." *Franchise Tax Bd.*, 463 U.S. at 22, 103 S. Ct. at 2853.

This "independent corollary" has been developed primarily in the context of federal preemption. Federal preemption of state law ordinarily constitutes a defense; hence the alleged federal preemption of a claim grounded solely upon state law does not usually warrant removal under 28 U.S.C. § 1441(b). *Id.*, 463 U.S. at 13-14, 103 S. Ct. at 2848. Under some circumstances, however, the preemptive force of federal law displaces any conceivable state cause of action that plaintiff may seek to assert, making the plaintiff's cause of action necessarily a federal one. *Id.*, 463 U.S. at 23-24, 103 S. Ct. at 2853-54. The state court complaint, with its cause of action thus recharacterized, may be removed to federal court because it states a claim arising under federal law, whether or not such was the plaintiff's intent.¹³

¹³ A court that recharacterizes the plaintiff's claim in this fashion arguably is breaching both the master of the complaint rule and the well-pleaded complaint rule. See, e.g., Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 Hastings L.J., 273, 282-83 (1993) (arguing that federal preemption is always a defense and therefore cannot support jurisdiction under a strict application of the well-pleaded complaint and master of the complaint rules); Eric J. Moss, Note, *The Breadth of Complete Preemption: Limiting the Doctrine to Its Roots*, 76 Va. L.

This doctrine originated in *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557, 88 S. Ct. 1235, 20 L. Ed. 2d 1261 (1968). Plaintiff sued a union and its members in state court to enjoin a strike at its plant. It alleged that it had a valid contract with the union that prohibited all work stoppages and that the defendants nonetheless had sanctioned work stoppages in violation of the agreement. *Id.*, 390 U.S. at 558, 88 S. Ct. at 1236. Thus framed, the complaint appeared to sound solely in state contract law. Nonetheless, the Court affirmed the removal of the case on federal question grounds. It reasoned that the contract at issue was a collective bargaining agreement governed exclusively by a provision of federal law, § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and that a claim under that agreement necessarily arose under federal law. *Id.*, 390 U.S. at 559-60, 88 S. Ct. at 1237. The Court subsequently has explained its decision in *Avco* as a function of the powerful preemptive force of Section 301 and the consequent conversion of the plaintiff's purported state law cause of action to one governed by federal law.

The necessary ground of decision was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and

Rev. 1601, 1612-13 (1990) (asserting that the jurisdictional rules developed in the complete preemption cases make "a substantial departure from the established well-pleaded complaint rule"). The Court never has acknowledged any contradiction, however, and consistently has characterized the rule developed in the complete preemption cases as a "corollary," not an exception. *Caterpillar*, 482 U.S. at 393, 107 S. Ct. at 2430; *Franchise Tax Bd.*, 463 U.S. at 22, 103 S. Ct. at 2853; *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S. Ct. 1542, 1546, 95 L. Ed. 2d 55 (1987).

a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.

Franchise Tax Bd., 463 U.S. at 23-24, 103 S. Ct. at 2853-54 (footnote omitted).

Franchise Tax Board emphasizes, however, that the "independent corollary" developed in *Avco* does not apply in all cases of federal preemption, but only where the allegedly preempted state cause of action described in the complaint can be recharacterized as a federal claim. The plaintiff in *Franchise Tax Board* filed suit to collect on state tax levies against funds held in trust under an ERISA-covered benefit plan. *Id.*, 463 U.S. at 4-6, 103 S. Ct. at 2844-45. The plan and its trustees removed the case to federal court, contending that ERISA's preemptive force was analogous to that of § 301 of the LMRA, thereby converting the plaintiff's claim to one arising under federal law. *Id.*, 463 U.S. at 22-24, 103 S. Ct. at 2853-54. The Court, after explaining the holding of *Avco* in the language quoted above, rejected the defendant's argument and ordered that the case be dismissed for lack of subject matter jurisdiction. *Id.*, 463 U.S. at 25-26, 103 S. Ct. at 2855. In reaching this result, the Court commented that, unlike § 301, "ERISA does not provide an alternative cause of action in favor of the State to enforce its rights. . . ." *Id.*, 463 U.S. at 26, 103 S. Ct. at 2855. In other words, the plaintiff's state law claim, even if it might be defeated by application of federal law, could not be

recharacterized into a federal claim (since no such federal claim existed) and hence was not removable.¹⁴

Two 1987 opinions reconfirmed that the "independent corollary" of *Avco* applies only when the state law cause of action has been displaced by a claim governed by federal law. In the first of the two decisions, *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987), a former General Motors employee brought suit in state court, purportedly under state law, asserting that he had been denied disability benefits improperly and that he had been terminated from his employment wrongfully. *Id.*, 481 U.S. at 60-61, 107 S. Ct. at 1545. The defendants removed the case to federal court, asserting that the plaintiff's claim for disability benefits necessarily arose under federal law because the disability benefit plan from which he sought recovery was governed by ERISA. *Id.*, 481 U.S. at 61-62, 107 S. Ct. at 1545. The Court held that removal was proper. First, it noted that under *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) the plaintiff's state law cause of action for recovery of plan benefits was preempted by ERISA. *Id.*, 481 U.S. at 62, 107 S. Ct. at 1546. Although ERISA preemption, without more, would not "convert a state claim into an action arising under federal

law," *id.*, 481 U.S. at 64, 107 S. Ct. at 1547, the Court determined that Taylor's claim had been so converted because it fell directly under § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), which provides an exclusive federal cause of action for resolution of disputes regarding benefits due from an ERISA-covered plan. 481 U.S. at 62-63, 66, 107 S. Ct. at 1546, 1548.

The Court reached a different jurisdictional result in *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987), decided only two months after *Metropolitan Life*, because the state law cause of action in that case could not be recharacterized into one arising under federal law. Several former Caterpillar employees sued under state law for breach of individual employment contracts. *Id.*, 482 U.S. at 390, 107 S. Ct. at 2428. Defendants responded that the claims in fact were governed by a collective bargaining agreement and therefore arose under § 301 of the LMRA, as had the claims in *Avco*. On that basis defendants sought to remove the case. *Id.* The Court rejected that attempt because plaintiffs had asserted claims that, unlike the claims at issue in *Avco*, were founded upon individual employment agreements, not a collective bargaining agreement. 482 U.S. at 394-97, 107 S. Ct. at 2430-32. Hence, while those claims might be subject to a defense under federal labor law, they could not be recharacterized as "artfully pleaded" federal claims – i.e., the state law claims asserted in the complaint had not been displaced by a body of federal law. 482 U.S. at 396-97, 107 S. Ct. at 2431-32.

¹⁴ The plaintiff in *Franchise Tax Board* also sought a declaratory judgment concerning its right to levy against plan assets given the trustees' assertion that ERISA prevented them from honoring such levies. *Id.* 463 U.S. at 6-7, 103 S. Ct. at 2845. The Court, in reliance upon *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S. Ct. 876, 94 L. Ed. 1194 (1950), and *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 70 (1936), determined that the declaratory judgment action did not arise under federal law and therefore ordered that it be dismissed as well. 463 U.S. at 20-22, 103 S. Ct. at 2852-53.

These four cases establish that a plaintiff, even though master of his complaint, cannot avoid federal jurisdiction by invoking a non-existent body of state law. As Judge Easterbrook of the Seventh Circuit has commented, "Sometimes . . . federal law so fills every nook

and cranny that it is not possible to frame a complaint under state law." *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1075 (7th Cir. 1992). When presented with "a federal case in state wrapping paper," *Graf v. Elgin, Joliet and Eastern Ry. Co.*, 790 F.2d 1341, 1344 (7th Cir. 1986) (Posner, J.), the defendant must be given the option to remove it, for "[a]ny other approach allows crafty drafting to defeat the statutory right to remove." *Bartholet*. These principles, while they have been generated primarily in cases involving preemption issues, apply whenever federal law has displaced that of a state, including, as will be discussed below, displacement by a federal judgment on a matter of federal law.

2. *Moitie* Authorizes Removal When A State Claim Can Be Recharacterized As a Federal Claim By Virtue Of the Claim Preclusive Effect of A Prior Federal Judgment on a Matter of Federal Law

While the instant case does not involve any preemption issues, it does concern a state law claim that, in respondents' view, is precluded by the unappealed 1986 bankruptcy court orders issued pursuant to 11 U.S.C. § 363(f). The complete preemption cases discussed in the preceding section – *Avco*, *Franchise Tax Board*, *Metropolitan Life* and *Caterpillar* – therefore are not controlling. Nonetheless, they are instructive, for they suggest that the propriety of removal in this case, or indeed in any case involving "artful pleading," depends upon whether the plaintiffs' purported state law claim can be recharacterized as a federal claim, albeit one in "state wrapping paper." *Graf*.

This Court has addressed a similar issue only once before. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394,

101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981). In *Moitie* a federal district court dismissed seven parallel civil actions that had been brought against various department stores by certain of their retail customers, who sought treble damages for alleged price fixing. *Id.*, 452 U.S. at 395-96, 101 S. Ct. at 2426. The district court based its dismissal on plaintiffs' failure to allege "injury" to their "business or property" within the meaning of § 4 of the Clayton Act, 15 U.S.C. § 15. *Id.*, 452 U.S. at 396, 101 S. Ct. at 2426-27. Plaintiffs in five of the seven suits appealed to the Ninth Circuit, which ultimately reversed the district court's judgment because of this Court's intervening decision in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979), holding that retail purchasers can suffer injury to their business or property for purposes of § 4 of the Clayton Act. *Id.*, 452 U.S. at 396-97, 101 S. Ct. at 2427. Plaintiffs in the two other suits, however, opted to forego their appeals and instead filed new actions in California state court in which, based upon the identical facts alleged in the dismissed federal suits, they asserted causes of action purporting to arise solely under state law. *Id.*, 452 U.S. at 396, 101 S. Ct. at 2427.

The defendants removed the two state court cases and sought to have them dismissed on res judicata grounds, the judgment of dismissal in the prior federal actions by then having become final. *Id.* The district court denied the plaintiffs' motion to remand, reasoning that the claims brought in the removed actions were "essentially federal," and it dismissed the removed actions as barred by res judicata. *Id.*, 452 U.S. at 396-97, 101 S. Ct. at 2427. The court of appeals reversed, affirming the district court's jurisdictional holding but disagreeing with its "strict application" of res judicata. *Moitie v. Federated Dept. Stores, Inc.*, 611 F.2d 1267, 1269-70 (9th Cir. 1980).

This Court granted certiorari "to consider the validity of the Court of Appeals' novel exception to the doctrine of res judicata." *Moitie*, 452 U.S. at 398, 101 S. Ct. at 2427.¹⁵ In the process, however, it commented in a footnote upon the propriety of removing a state court action that on its face presented only state law claims for decision. Because that footnote is central to the resolution of the instant case, it is quoted below in full.

The Court of Appeals also affirmed the District Court's conclusion that *Brown* II [one of the two state court actions that had been removed and the only one still pending at the time of the Court's decision] was properly removed to federal court, reasoning that the claims presented were "federal in nature." We agree that at least some of the claims had a sufficient federal character to support removal. As one treatise puts it, courts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." 14 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3722, pp. 564-566 (1976) (citing cases) (footnote omitted). The District Court applied that settled principle to the facts of this case. After "an extensive review and analysis of the origins and substance of" the two *Brown* complaints, it found, and the Court of Appeals expressly agreed, that respondents had attempted to avoid removal jurisdiction by "artfull[ly]" casting their "essentially federal law claims" as state-law claims. We will not question

¹⁵ The Court ultimately rejected the exception as "an unprecedented departure from accepted principles of res judicata" and reversed the Court of Appeals. *Id.*, 452 U.S. at 399, 101 S. Ct. at 2428.

here that factual finding. See *Prospect Dairy, Inc. v. Dellwood Dairy Co.*, 237 F. Supp. 176 (NDNY 1964); *In re Wiring Device Antitrust Litigation*, 498 F. Supp. 79 (EDNY 1980); *Three J Farms, Inc. v. Alton Box Board Co.*, 1979-1 Trade Cases ¶ 62,423 (SC 1978), rev'd on other grounds, 609 F.2d 112 (CA4 1979), cert. denied, 445 U.S. 911, 100 S. Ct. 1090, 63 L. Ed. 2d 327 (1980).

Id., 452 U.S. at 397 n. 2, 101 S. Ct. at 2427 n. 2.

The Court did not explain what gave the state court actions in *Moitie* their "federal character," but the authorities cited in the footnote demonstrate that the key issue, as in the preemption cases, is recharacterization – is the purported state law claim one that necessarily arises under federal law? The Wright and Miller section cited in the *Moitie* footnote, for example, asks whether "the real nature of the claim is federal, regardless of plaintiff's characterization" and, in the very next sentence, clarifies that general pronouncement:

[I]n many contexts plaintiff's claim may be one that is exclusively governed by federal law, so that the plaintiff necessarily is stating a federal cause of action, whether he chooses to articulate it that way or not.

14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3722 (1976), at 564-66.¹⁶

Consistently with this overarching principle, the courts in *In re Wiring Device* and *Three J Farms*, two of the three district court cases cited in the *Moitie* footnote, recharacterized state law claims that in fact were governed exclusively by federal law. In both cases plaintiffs alleged that activity in interstate commerce had violated

¹⁶ This passage has been carried forward verbatim in the second edition of the Wright and Miller treatise. 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3722 (2d ed. 1985), at 266-73.

South Carolina's antitrust law, which previously had been construed by that state's highest court to apply only to purely intrastate commerce. Hence no state law claim existed in those cases; the plaintiffs' antitrust claims could arise only federal law. *Wiring Device*, 498 F. Supp. at 83; *Three J*, 1979-1 Trade Cas. (CCH) ¶ 62,423 at 76,550.¹⁶ Similarly, the complaint in the third cited decision, *Prospect Dairy*, while it referred expressly only to New York tort law, tracked the language of both the Sherman Act and § 303 of the LMRA, 29 U.S.C. § 187, and asserted violations of "such other provisions of law, both under federal and state mandate, applicable thereto." *Prospect Dairy*, 237 F. Supp. at 178. It thus could be, and apparently was, viewed as a case in which the plaintiff in fact had asserted federal claims, however vaguely and inarticulately. *Id.* at 178-79.

The *Moitie* footnote, viewed in light of the cited authorities, thus can be seen as a precursor of the pre-emption cases (all of which, save for *Avco*, were decided after *Moitie*) and their "independent corollary" to the well-pleaded complaint rule, for removal jurisdiction in both *Moitie* and the preemption cases hinges on the recharacterization of a purported state law claim that in fact is necessarily federal. In *Avco* and *Metropolitan Life* the plaintiff's state law claims had been displaced (and replaced) by federal claims due to the "powerful" preemptive force of § 301 of the LMRA and § 502(a)(1)(B) of

¹⁶ California law, unlike South Carolina law, can reach transactions in interstate commerce. See *Younger v. Jensen*, 26 Cal. 3d 397, 405, 605 P.2d 813, 818, 161 Cal. Rptr. 905, 910 (1980). Thus the jurisdictional holding in *Moitie* must be based upon principles broader than those implicated by the interstate reach of the plaintiffs' allegations.

ERISA respectively, thus warranting removal. *Metropolitan Life*, 481 U.S. at 63-67, 107 S. Ct. at 1546-48; *Avco*, 390 U.S. at 559-60, 88 S. Ct. at 1237. The recharacterization in *Moitie* stems from a different, but equally powerful, doctrine, that of res judicata or, as it now is often called, claim preclusion.

The doctrine of res judicata, as the Court stated in *Moitie* itself, is "a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts. . . ." *Moitie*, 452 U.S. at 401, 101 S. Ct. at 2429, (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S. Ct. 506, 507, 61 L. Ed. 1148 (1917)). A final judgment on the merits of an action precludes the parties and their privies from relitigating issues that were or could have been raised in that action. *Moitie*, 452 U.S. at 398, 101 S. Ct. at 2428. This Court, the lower federal courts and the Restatement (Second) of Judgments all have described the preclusive effect of a final judgment in terms of "merger" and "bar." In the context of a class action, for example, this Court has stated,

Basic principles of res judicata (merger and bar or claim preclusion) . . . apply. A judgment in favor of the plaintiff class extinguishes their claim, which merges into the judgment granting relief. A judgment in favor of the defendant extinguishes the claim, barring a subsequent action on that claim.

Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 874, 104 S. Ct. 2794, 2798, 81 L. Ed. 2d 718 (1984); see also *Waid v. Merrill Area Pub. Schools*, 91 F.3d 857, 863 (7th Cir. 1996) (defining "merger" and "bar" similarly); *Finley v. United States*, 612 F.2d 166, 170 (5th Cir. 1980) (all causes of action that could have been, but were not, raised in the earlier proceeding "are considered to have merged into

the prior judgment"); Restatement (Second) of Judgments §§ 18-19, 24 (1982).

The "merger" and "bar" effects of a final judgment lie at the core of *Moitie*'s jurisdictional holding. The federal judgment in *Moitie* had extinguished any state claim by operation of the doctrine of merger; the state claim "merged into the federal judgment and disappeared, leaving nothing on which to base a suit in state court." *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 612 (7th Cir. 1997) (Posner, J.). Merger thus effects a recharacterization of the purported state claims into federal ones.

[W]e can recharacterize a state claim barred by the res judicata effect of a federal judgment as an artfully pleaded federal claim. The federal judgment would ordinarily preclude the plaintiff from relitigating any federal or state claim arising out of the same operative facts. A purported state claim based on those facts would be in effect the same federal claim against which the judgment had been entered. The removing court could thus recharacterize the state claim as an artfully pleaded federal claim filed to circumvent the res judicata effect of the federal judgment.

Sullivan v. First Affiliated Sec., Inc., 813 F.2d 1368, 1376 (9th Cir.), cert. denied, 484 U.S. 850, 108 S. Ct. 150, 98 L. Ed. 2d 106 (1987) (emphasis supplied and citations omitted); accord, *Carpenter*, 44 F.3d at 370; *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911-12 (7th Cir. 1993). If the prior federal judgment sounds in federal law, then the artfully pleaded state claim can be recharacterized as a removable federal claim. *Carpenter*; *Ultramar Am., Ltd. v. Dwelle*, 900 F.2d 1412, 1415-16 (9th Cir. 1990).

"Artful pleading," as that term is used in both the *Moitie* footnote and in the complete preemption cases,

Caterpillar, 482 U.S. at 396-97, 107 S. Ct. at 2431-32, refers to a plaintiff's attempt to characterize a necessarily federal claim in state law terms. In *Moitie* the prior federal antitrust judgment rendered the later-filed state claims literally non-existent, for they had merged into the federal judgment. Just as § 301 of the LMRA and § 502 of ERISA rendered federal the purported state claims in *Avco* and *Metropolitan Life*, the prior federal judgment in *Moitie* rendered federal (and hence removable) any subsequent purported state claim based upon the same facts.¹⁷

The Fifth Circuit, in its decision below, correctly interpreted *Moitie* to allow the removal of a state cause of action completely precluded by a prior federal judgment on a question of federal law. *Rivet*, 108 F.3d at 586; Jt. App. 64. It remains only to determine whether the rule applies when, as here, the prior federal judgment was generated not in an ordinary civil action, but in a bankruptcy proceeding in which the current plaintiffs participated as creditors.

¹⁷ Petitioners' insistence throughout their brief that respondents have based removal of this case on an affirmative defense misses the point altogether. Respondents agree that federal defenses cannot justify removal of a case founded entirely upon state law, but that is not the issue presented for review. Rather, all of the petitioners' claims involving the effect of their mortgage upon the Leasehold Estate merged into the prior bankruptcy court orders, which were not appealed. It is the recharacterization of petitioners' claims as federal by virtue of this merger, in accordance with *Moitie* and the Court's other artful pleading cases and in light of the bankruptcy court orders, that makes them removable. See *infra* at 31-32, 39-47.

3. The Jurisdictional Rule of *Moitie* Applies in the Instant Case

The federal orders upon which respondents rely to support removal were generated in the context of a contested proceeding in bankruptcy. The trustee filed an application pursuant to 11 U.S.C. § 363(f) to sell certain property of the debtor's estate, including the Leasehold Estate, free and clear of all liens and mortgages. The bankruptcy court set a deadline for creditors to file objections to the sale application and set a hearing date on any objections that might be filed. Jt. App. 10. The Mirannes appeared through counsel at the hearing,¹⁸ held as a contested matter under Fed. R. Bankr. P. 6004 and 9014. Jt. App. 12. At the hearing the court, in deciding whether to grant the trustee's motion in the face of what apparently was opposition from the Mirannes, necessarily had to determine whether the Mirannes' Second Mortgage would continue to encumber the Leasehold Estate after it was sold. The court determined that it would not. Jt. App. 12-13, 18.

The Mirannes, who appeared in the bankruptcy court as creditors objecting to the trustee's motion, appear in the instant proceeding as plaintiffs. Thus, although the claim regarding the continued impact of the Mirannes' mortgage on the Leasehold Estate necessarily was resolved in the bankruptcy proceeding (and resolved adversely to the Mirannes), the alignment of the parties in that proceeding appears, at least on the surface, to differ somewhat from their alignment here. Those

¹⁸ The bankruptcy court order reflects that Edmond G. Miranne, Jr. appeared as counsel for himself and his father, but does not mention their wives. The order nonetheless is binding on the wives. See *infra* at Section II(A)(3), pp. 43-45.

differences, however, are more apparent than real and in any event are not determinative of removal jurisdiction.

Under the Bankruptcy Rules it is the objection to a proposed sale, not the application for the sale, that triggers the contested proceeding. More specifically, Fed. R. Bankr. P. 6004(b) provides that an objection to a proposed sale of property of a debtor is governed by Fed. R. Bankr. P. 9014, which prescribes the procedure to be followed in contested matters. Hence, in objecting to the sale the Mirannes' position was analogous to that of the plaintiffs in an ordinary civil action, the same position that they occupy in the instant case.

In any event, whatever differences there arguably may be in the parties' alignment are of no importance for jurisdictional purposes, petitioners' contentions to the contrary notwithstanding. See Pet. Brief 29-30. In the bankruptcy proceeding petitioners asserted that they had a valid mortgage against the property that the trustee wished to sell and litigated whether, under 11 U.S.C. § 363(f), their Second Mortgage would survive the public sale. They lost. They now seek to foreclose upon the same mortgage. However, once a federal bankruptcy court has determined whether a secured lender can realize on its collateral at all, a determination that is of the very essence of what federal bankruptcy courts do, the secured lender has no further claims remaining with regard to that security. The current suit therefore is precluded by the bankruptcy court orders, never appealed,¹⁹ and can be recharacterized, per *Moitie*, as a reenactment of the contested proceeding generated by the Mirannes' objection in the bankruptcy court, albeit a reenactment in state

¹⁹ The claim preclusive effect of the bankruptcy court orders is discussed in more detail *infra* at Section II, pp. 39-47.

law garb. Thus recharacterized, the Mirannes' state court claim arises under federal law and is removable, just as were the state court claims in *Moitie*.

C. The Jurisdictional Principles Derived from *Moitie* Further the Policies Served By the Statutory Grant of Federal Question Jurisdiction, While Simultaneously Respecting the Competence and Sovereignty of State Courts

This Court has interpreted the statutory grant of federal question jurisdiction "with an eye to practicality and necessity." *Franchise Tax Bd.*, 463 U.S. at 20, 103 S. Ct. at 2852. In so doing, it has devised jurisdictional standards consistent with "the demands of reason and coherence, and the dictates of sound judicial policy. . . ." *Romero*, 358 U.S. at 379, 79 S. Ct. at 484. The jurisdictional principles derived from *Moitie*, as articulated above, satisfy these requirements. They provide a narrowly tailored set of rules that can be applied easily, that further the purposes of federal question jurisdiction and that simultaneously respect the competence and sovereignty of the state courts.

Federal question jurisdiction promotes uniform application and interpretation of federal laws. See American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 4 (1969) ("[F]ederal question jurisdiction is necessary to preserve uniformity in federal law and to protect litigants relying on federal law from the danger that state courts will not properly apply that law, either through misunderstanding or lack of sympathy"); Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 Wake Forest L. Rev. 927, 948 (1996). Federal question removal jurisdiction complements the parallel grant of original jurisdiction by

providing defendants with a forum for the protection of federal rights. *Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 246, 90 S. Ct. 1583, 1590, 26 L. Ed. 2d 199 (1970). In light of these general policy considerations the Court, in deciding controversies concerning the extent of federal question jurisdiction, has viewed the nature of the federal interest at stake in any given case as of primary importance. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 814 n. 12, 106 S. Ct. 3229, 3235 n. 12, 92 L. Ed. 2d 650 (1986).

Cases falling within the scope of *Moitie*'s jurisdictional rule implicate quite significant federal interests, in terms of both the uniform interpretation of federal law and the integrity of the federal court system. In such cases the federal court already has considered and determined an issue of federal law and embodied that determination in a judgment having claim preclusive effect. Often the federal issues that are the subject of the judgment fall within a field in which the federal courts have a special expertise and interest, such as bankruptcy, the area of federal law at issue here, see U.S. Const., Art. I, Sect. 8, cl. 4 ("The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States"); *Celotex Corp. v. Edwards*, 514 U.S. 300, 308, 115 S. Ct. 1493, 1499, 131 L. Ed. 2d 403 (1995), and antitrust law, the area at issue in *Moitie*. See 15 U.S.C. § 15(a) (granting federal district courts exclusive jurisdiction over treble damages actions brought pursuant to the federal antitrust laws). When the losing party seeks to relitigate the already-decided federal issue by disguising its claim in state clothing, it undermines the interest in uniform interpretation of federal law and, perhaps even more importantly, manipulates the dual

system of federal and state courts in a manner that undermines the integrity of federal mandates and damages the very federalism that petitioners claim to champion. See Pet. Brief 19, 22-23, 30-32.

Federalism is founded upon "a proper respect for state functions . . . and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44, 91 S. Ct. 746, 750, 27 L. Ed. 2d 669 (1971). Proper respect for state functions, however, does not require a federal court, having already ruled on a matter of federal law, to ignore the losing party's attempt to raise the same claims anew, albeit in disguise, in a state court system. To the contrary, federalism requires sensitivity to the legitimate interests of the national government as well. *Id.* Among those interests is the protection of federal judgments from collateral attack in state court by artful manipulation of pleadings. See *Deauville Associates, Inc. v. Lojoy Corp.*, 181 F.2d 5, 6 (5th Cir. 1950); *Nowling v. Aero Services Int'l, Inc.*, 734 F. Supp. 733, 737 (E.D. La. 1990).

A plaintiff who seeks to relitigate federal issues already determined by a federal court has no state claims left, regardless of the characterization that he gives to his claims, for all state issues already have been merged into the federal judgment. See *Brand Name Prescription Drugs*, 123 F.3d at 612; *Carpenter*, 44 F.3d at 366-67, 370. The state's interest in such a controversy is minimal at best, and removal under those circumstances hardly does violence to the interests of federalism. Indeed, removal under *Moitie* is a less intrusive alternative under these circumstances to a remedy already authorized by Congress, an injunction under the relitigation exception to the

Anti-Injunction Act, 28 U.S.C. § 2283.²⁰ A federal court that enjoins a state court from proceeding intrudes deeply into the workings of state government, yet Congress has authorized federal courts to issue such orders when necessary to protect a federal court judgment. By comparison, removal of a case from state court works automatically, shifting the case smoothly and without disruption from one court system to another upon the filing of a notice of removal.²¹ See 28 U.S.C. § 1446. Hence petitioners' assertion that *Moitie*, as interpreted by the Fifth Circuit below, would "entail an enormous expansion of federal jurisdiction," Pet. Brief 30, is rhetoric without substance.

Moitie, like the Court's other artful pleading cases, authorizes removal in certain narrow circumstances because in those circumstances the plaintiff's claim is necessarily federal, no matter how plaintiff seeks to characterize it. Removal of such a necessarily federal claim is consistent with the jurisdictional policies of 28 U.S.C. §§ 1331 and 1441, promotes substantial federal interests concerning the integrity of the federal court system and its judgments and minimizes any adverse impact upon

²⁰ 28 U.S.C. § 2283 provides in relevant part,

A court of the United States may not grant an injunction to stay proceedings in a State court except . . . to protect or effectuate its judgments.

²¹ It should be noted that injunctions under the relitigation exception to the Anti-Injunction Act are available in several circumstances not covered by *Moitie*. For example, an injunction could issue when the prior judgment has no federal law component or in cases presenting issue preclusion, but not claim preclusion. See *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150-51, 108 S. Ct. 1684, 1691-92, 100 L. Ed. 2d 127 (1988). *Moitie* does not apply in either of these circumstances.

the state's parallel court system. The jurisdictional rule of *Moitie* is thus consistent with the demands of reason, coherence and sound judicial policy. *Romero*. The Court should reaffirm its continued vitality.

D. The Determination of Subject Matter Jurisdiction Often Requires Consideration of the Merits

Petitioners posit that *Moitie*, as interpreted by the Fifth Circuit in the instant case, creates a logical conundrum by requiring a federal court to review an aspect of the merits of a removed case, namely whether it is barred by res judicata, to determine if it has subject matter jurisdiction in the first place. Pet. Brief 33-35. In creating this straw man, petitioners wrongly suggest that jurisdictional determinations in all other types of cases can be separated clearly from consideration of the merits.

This Court's jurisprudence is replete with counterexamples, perhaps the most analogous coming from *Moitie*'s cousins, the complete preemption decisions. In determining in *Franchise Tax Board*, for example, that the case before it did not arise under ERISA and hence had been removed improvidently, the Court had to consider an important aspect of the case's merits – whether ERISA preempted the state law claims found in the complaint – an issue it ultimately decided favorably to the plaintiff. *Id.*, 463 U.S. at 24-27, 103 S. Ct. at 2854-55. Indeed, in any case involving the "complete preemption corollary to the well pleaded complaint rule," *Caterpillar*, 482 U.S. at 393, 107 S. Ct. at 2430, the court must decide a merits issue, federal preemption of plaintiff's state law claims, to determine its jurisdiction. See, e.g., *id.*, 482 U.S. at 394-96, 107 S. Ct. at 2430-31; *Avco*, 390 U.S. at 559-60, 88 S. Ct. at 1237 (determining first that plaintiff's state law claims

were completely preempted and concluding from this that the district court had jurisdiction over the case); *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992) (court had to conclude that allegations of complaint fell under ERISA to determine propriety of removal).

Similar examples abound outside the preemption context. Where a removing defendant alleges that the plaintiff has fraudulently joined a non-diverse defendant to prevent removal, a federal court can look beyond the complaint to the merits of the claim against that defendant to determine whether jurisdiction exists.

If . . . a non-resident defendant is joined, the joinder, although fair upon its face, may be shown by a petition for removal to be only a sham or fraudulent device to prevent removal; but the showing must consist of a statement of facts rightly leading to that conclusion apart from the pleader's deductions.

Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97, 42 S. Ct. 35, 37, 66 L. Ed. 144 (1921); see also *Sid Richardson Carbon & Gasoline Co. v. Interenergy Resources, Ltd.*, 99 F.3d 746, 751 (5th Cir. 1996) (court should employ a summary judgment-like procedure to resolve fraudulent joinder contentions); *Faucett v. Ingersoll-Rand Min. & Mach. Co.*, 960 F.2d 653, 654-55 (7th Cir. 1992) (fraudulent joinder established by affidavit absolving non-diverse defendant of liability). Courts likewise must consider the merits of a plaintiff's complaint to determine whether the amount in controversy meets jurisdictional requirements. E.g., *Gibbs v. Buck*, 307 U.S. 66, 72, 59 S. Ct. 725, 729, 83 L. Ed. 1111 (1939) ("If there were any doubt of the good faith of the allegations [of the amount in controversy], the court might have called for their justification by evidence"); *McNutt v. General Motors Acceptance Corp. of Indiana*, 298

U.S. 178, 184, 56 S. Ct. 780, 783, 80 L. Ed. 1135 (1936). Subject matter jurisdiction and merits issues also can overlap substantially in cases involving sovereign immunity, *Land v. Dollar*, 330 U.S. 731, 739, 67 S. Ct. 1009, 1013, 91 L. Ed. 1209 (1947) ("the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits"), and the "in commerce" jurisdictional requirement of the antitrust laws. *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 201 n. 19, 95 S. Ct. 392, 402 n. 19, 42 L. Ed. 2d 378 (1974) (noting identity of jurisdictional issues and certain issues on the merits); *Thornhill Pub. Co., Inc. v. General Tel. & Electronics Corp.*, 594 F.2d 730, 733-34 (9th Cir. 1979) ("if the attack on jurisdiction requires the court to consider the merits of the case, the court has jurisdiction to proceed to a decision on the merits").

Moitie's narrow and limited scope requires far less intrusive "merits" review than is mandated when, for example, a claim of fraudulent joinder is raised in a diversity action. In the latter, evidence in the form of affidavits (dealing with the fraudulently joined party's job, scope of responsibility or activities) often must be presented to the court to be considered in ruling on the issue; in *Moitie*, as here, the only items of "evidence" to be considered are prior court orders and pleadings. The Fifth Circuit's opinion therefore is not, as the petitioners claim, an aberration; rather, it is merely the latest in a long line of similar decisions, many of them from this Court, recognizing that in certain limited circumstances jurisdiction and "merits" issues are intertwined and must be considered together. The fact that a mixed question of jurisdiction and merits occurs in this limited context does not warrant any retreat from the jurisdictional principles enunciated in *Moitie*.

II. Petitioners' Claims Are Barred By the Preclusive Effect of the Bankruptcy Court Sale Orders

A. All of the Elements of Res Judicata Are Satisfied In This Case

The doctrine of res judicata serves "vital public interests," *Moitie*, 452 U.S. at 401, 101 S. Ct. at 2429, namely "that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Id.* (quoting *Baldwin v. Traveling Men's Ass'n*, 283 U.S. 522, 525, 51 S. Ct. 517, 518, 75 L. Ed. 1244 (1931)). A final judgment on the merits of an action by a court of competent jurisdiction precludes the parties and those in privity with them from relitigating issues that were or could have been raised in that action. *Id.*, 452 U.S. at 398, 101 S. Ct. at 2428; *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1995); *Israel Discount Bank, Ltd. v. Entin*, 951 F.2d 311, 314 (11th Cir. 1992). Each of these elements is present here, establishing both that the district court properly exercised removal jurisdiction over this case under *Moitie* and that it properly dismissed petitioners' claims as barred by the prior bankruptcy court orders.

1. The Bankruptcy Court Orders Constitute Final Judgments for Claim Preclusion Purposes

The normal rules of res judicata apply to the decisions of bankruptcy courts. *Katchen v. Landy*, 382 U.S. 323, 334, 86 S. Ct. 467, 475, 15 L. Ed. 2d 391 (1966). Final appealable orders of the bankruptcy court therefore are entitled to preclusive effect. *Id.*, *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 375-77, 60 S. Ct. 317, 319-20, 84 L. Ed. 329 (1940). Orders confirming the

sale of property of a debtor's estate fall within this category. *Hendrick v. Avent*, 891 F.2d 583, 586 & nn. 6-7 (5th Cir.), cert. denied, 498 U.S. 819, 111 S. Ct. 64, 112 L. Ed. 2d 39 (1990); *Matter of Met-L-Wood Corp.*, 861 F.2d 1012, 1016 (7th Cir. 1988), cert. denied sub nom. *Gekas v. Pipin*, 490 U.S. 1006, 109 S. Ct. 1642, 104 L. Ed. 2d 157 (1989).

2. The Bankruptcy Court Had Jurisdiction to Issue the Sale Authorization and Confirmation Orders

Congress granted "comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate. . . ." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308, 115 S. Ct. 1493, 1499, 131 L. Ed. 2d 403 (1995) (*quoting Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984)). District courts have jurisdiction under 28 U.S.C. § 1334 over cases arising under, arising in or related to cases under Title 11. A proceeding to sell property free and clear of liens pursuant to 11 U.S.C. § 363(b) and (f) is a core proceeding in which the bankruptcy court has jurisdiction to issue final orders and judgments. 28 U.S.C. § 157(a), (b)(1), (b)(2)(N); *In re Heine*, 141 B.R. 185, 187-88 (Bankr. D.S.D. 1992). More particularly, the THILP bankruptcy court had jurisdiction to take cognizance of and decide disputes concerning the proposed sale of the property that was subject to the Mirannes' mortgage. See *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1206 (5th Cir. 1988) (jurisdiction is "the authority by which courts and judicial officers take cognizance of and decide cases").

Petitioners nonetheless suggest that the bankruptcy court lacked the power to issue the sale orders in the

THILP bankruptcy because, in their view, the court followed the wrong procedure, allowing the trustee to proceed via bankruptcy motion practice under Fed. R. Bankr. P. 9014 instead of by adversary proceeding under Fed. R. Bankr. P. 7001, *et seq.* That suggestion confuses jurisdictional defect with procedural error and is, in any event, an incorrect construction of the Bankruptcy Rules.

Jurisdiction connotes the authority by which a court may hear and decide cases. *Amoco Prod. Co.* Petitioners appear to concede that bankruptcy courts have the authority to hear and decide disputes concerning whether property of a debtor should be sold free and clear of encumbrances. Instead they question whether the bankruptcy court, by failing to require the trustee to institute an adversary proceeding, correctly exercised that authority. Those are matters of bankruptcy procedure, not of jurisdiction, and should have been raised either by a timely appeal or by a motion for reconsideration, not by a collateral attack years after the fact. *Met-L-Wood*, 861 F.2d at 1016-18.

Moreover, even if a procedural defect under some circumstances somehow could be deemed jurisdictional, petitioners' argument still fails, for the Bankruptcy Rules specifically authorize the procedure that the bankruptcy court used here. Fed. R. Bankr. P. 6004(b) provides that any objection to the proposed sale of estate property is governed by Rule 9014, entitled "Contested Matters." While adversary proceedings are required "to determine the validity, priority or extent of a lien or other interest in property," Fed. R. Bankr. P. 7001(2), the validity, priority or extent of the Mirannes' lien never was placed before the bankruptcy court for decision. Instead that tribunal was asked to decide whether the property could be sold

free and clear of all liens, including petitioners', assuming all of those liens to be valid. That proceeding falls squarely within the ambit of Rules 6004(b) and 9014.²²

Finally, petitioners for the first time challenge the adequacy of the notice with which they were provided and assert that inadequate notice of the sale proceeding may have deprived them of due process. This argument was not raised in either court below, nor was it raised in the petition for certiorari; accordingly, the Court should not consider it at all. Sup. Ct. R. 14.1(a), 24.1(a); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645, 112 S. Ct. 1644, 1649, 118 L. Ed. 2d 280 (1992). In any event, the argument is groundless. Petitioners apparently received actual notice of the bankruptcy hearing, as required by Fed. R. Bankr. P. 6004(a), for they entered an appearance at the hearing. Jt. App. 12. Having received actual notice and the opportunity to respond, petitioners suffered no violation of their due process rights. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950); *Baker v. Latham Sparrowbush Associates*, 72 F.3d 246, 254 (2d Cir. 1995) (citing cases).

²² Petitioners' citations to *In re Parrish*, 171 B.R. 138 (Bankr. M.D. Fla. 1994), and *In re Wing*, 63 B.R. 83 (Bankr. M.D. Fla. 1986), are inapposite. The court in *In re Wing* commented that "the extent of a creditor's right or interest in estate property" must be determined in an adversary proceeding, 63 B.R. at 85, a proposition that is correct, but irrelevant here, where the extent of the Mirannes' pre-sale lien never was placed at issue. *In re Parrish* involved a sale without notice to the lienholder, whose lien therefore survived the sale. It has no application here, where petitioners actually appeared at the hearing that resulted in the sale authorization.

3. All of the Petitioners Were Either Parties to, or in Privity With Parties to, the Bankruptcy Proceeding

Petitioner Edmond G. Miranne, Jr. appeared at the bankruptcy court hearing on the proposed sale. The court's order states that his appearance was on behalf of himself and his father, who is also one of the petitioners, but makes no reference to the wives, Rivet and Winer, the other two petitioners. Jt. App. 12. Nonetheless, the order is binding upon Rivet and Winer if their husbands adequately represented their interests before the bankruptcy court.²³ *Richards v. Jefferson County, Ala.*, ___ U.S. ___, 116 S. Ct. 1761, 1766, 135 L. Ed. 2d 76 (1996); see also *Hansberry v. Lee*, 311 U.S. 32, 41-42, 61 S. Ct. 115, 117-18, 85 L. Ed. 22 (1940).

The state court complaint alleges that petitioners "are the owners and holders" of a collateral mortgage note secured by an act of collateral mortgage.²⁴ R. 5 The collateral mortgage identified in the complaint was one of the

²³ Petitioners contend that despite the husbands' appearance at the hearing in the bankruptcy proceeding, not even they should be deemed parties to that proceeding. More particularly, they assert that because no adversary proceeding was held, the husbands "cannot be held to have knowingly participated as parties in any proceeding that they knew could have resulted in the cancellation of their mortgage. . . ." Pet. Brief 38. Petitioners have cited no legal or factual support for this novel proposition, which they did not raise in either court below and which therefore ought not be considered here. *Taylor v. Freeland & Kronz*, 503 U.S. at 645, 112 S. Ct. at 1649. In any event, the argument that creditors who actually participated in a bankruptcy hearing concerning the fate of their security somehow were not parties to that proceeding is facially absurd.

²⁴ For a discussion of the Louisiana collateral mortgage security package, see n. 2 *supra*.

encumbrances released by the bankruptcy court's "free and clear" sale orders. Jt. App. 12-13, 18, 23-28, 32. Under Louisiana law all four petitioners are considered to be co-owners of the obligation (if any) secured by the Second Mortgage, La. Civ. Code Ann. Art. 480, and as two of the four co-owners, the Miranne husbands can act on behalf of their wives in connection with their common property.²⁵ *Gulf Refining Co. v. Hayne*, 148 La. 340, 86 So. 891, 892 (1920). Moreover, the interests of Rivet and Winer in the bankruptcy proceeding were identical to the interests of their husbands – the preservation and protection of the Second Mortgage. By their participation in the bankruptcy proceeding, the Miranne husbands attempted to preserve the Second Mortgage in furtherance of the common interest that they had with their wives with respect to the obligation secured thereby. As the trial court commented, "Plaintiffs do not even attempt to argue, and indeed it seems wholly implausible, that the Mirannes represented only their own interests at the bankruptcy hearing and not also their wives' interests in preserving and enforcing the Second Mortgage." Jt. App. 43. Under these circumstances, the husbands' participation in the bankruptcy proceeding is binding on the wives for res judicata purposes. *Eubanks v. Federal Deposit Ins. Corp.*, 977 F.2d 166, 170 (5th Cir. 1992); *Cotton v. Federal Land*

²⁵ The Fifth Circuit treated the collateral mortgage note as if it were community property under Louisiana law. 108 F.3d at 587; Jt. App. 67. Petitioners contend that they had opted out of Louisiana's community property regime. Pet. Brief 9 n. 8. The record is silent on this point. For present purposes only, respondents are willing to assume that petitioners had opted out of Louisiana's community property regime, which would make the four of them co-owners of the collateral mortgage note under La. Civ. Code Ann. art. 480.

Bank of Columbia, 676 F.2d 1368, 1370 (11th Cir.), cert. denied, 459 U.S. 1041, 103 S. Ct. 459, 74 L. Ed. 2d 610 (1982).²⁶

4. Both the Bankruptcy Proceeding And the Instant Case Arise From A Common Nucleus of Operative Facts – the Viability and Enforceability of the Second Mortgage

For a later suit to be barred by a judgment entered in an earlier one, the same claim or cause of action must have been asserted in both cases. *Nevada v. United States*, 463 U.S. 110, 130, 103 S. Ct. 2906, 2918, 77 L. Ed. 2d 509 (1983). While this Court has not settled upon a specific test for determining the identity of causes of action, *id.*, 463 U.S. at 130-31 & n. 12, 103 S. Ct. at 2918-19 & n. 12, the courts of appeals generally have adopted the transactional test of § 24 of the Restatement (Second) of Judgments (1982). E.g., *Interoceanica Corp. v. Sound Pilots, Inc.*, 107 F.3d 86, 90-91 (2nd Cir. 1997); *Kratville v. Runyon*, 90 F.3d 195, 198 (7th Cir. 1996); *Matter of Baudoin*, 981 F.2d 736, 743 (5th Cir. 1993). To determine whether the same transactions are at issue in successive cases, courts must consider "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Restatement (Second) of Judgments § 24(2)

²⁶ FSA and Regions were not parties to the bankruptcy proceeding. They are successors-in-interest to FFB with respect to the property that was the subject of the bankruptcy orders, however, and the orders therefore have preclusive effect as to them. See *Meza v. General Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir. 1990); *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 188 (5th Cir. 1990).

(1982). The determination is to be made pragmatically, with attention to the facts of each particular case. *Id.* & comment b.

Both the bankruptcy court sale orders and the petitioners' claims in the instant action are based upon the same set of facts – the viability and enforceability of the Second Mortgage. In 1986 the bankruptcy court authorized the sale of the debtor's property free and clear of the Second Mortgage. Petitioners now seek to foreclose upon, and to obtain damages for the alleged failure of respondents to heed their rights under, that very mortgage. Yet, as the Fifth Circuit stated below,

Without an extant enforceable mortgage, the Mirannes cannot forthrightly plead either a right of action or a cause of action in state court. Indeed, all of the acts of alleged wrongdoing in the December 1993 transactions are so inextricably intertwined with and dependent on the 1986 bankruptcy orders directing and approving the sale of the leasehold estate free and clear of the second mortgage that we would be hard pressed to conjure up a better hypothetical example of two actions arising from the same nucleus of operative facts.

108 F.3d at 589; Jt. App. 71-72.

Petitioners' contention that their cause of action arises from occurrences subsequent to the sale orders ignores the obvious – their case rises (or, in respondents' view, falls) on the enforceability of the Second Mortgage. The 1993 transactions about which they complain in their state court pleadings are not actionable unless their Second Mortgage was enforceable against the Leasehold Estate at the time. The enforceability of the mortgage against the Leasehold Estate having been litigated before the bankruptcy court in 1986, it cannot be relitigated in a

lawsuit filed eight years later. Rather, a final bankruptcy sale "free and clear" bars any subsequent claims that challenge the finality or integrity of the transfer of title pursuant to that sale. See *La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900, 908 (7th Cir. 1990); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 870-72 (5th Cir. 1984).

"The policies advanced by the doctrine of res judicata are at their zenith in cases concerning real property." *Nevada*, 463 U.S. at 129 n. 10, 103 S. Ct. at 2918 n. 10. Moreover, collateral attacks upon bankruptcy orders "seriously undercut[] the orderly process of the law." *Celotex*, 514 U.S. at 308, 115 S. Ct. at 1501; see also *Met-L-Wood*, 861 F.2d at 1019 ("Unless bankruptcy sales are final when made, rather than subject to being ripped open years later, high prices will not be offered for the assets of bankrupt firms"). Petitioners lost their mortgage when the bankruptcy court's sale orders became final and non-appealable. The current action, being founded upon that mortgage, is barred.

B. The Continued Presence of the Petitioners' Mortgage on the Public Records of Louisiana Has No Bearing Upon the Claim Preclusive Effect of the Bankruptcy Court Orders

The bankruptcy court ordered that the trustee's sale proceed free and clear of the Second Mortgage. As an adjunct, it also ordered that the mortgage be canceled from Louisiana's public records. Nonetheless, the mortgage never has been canceled. In a final attempt to salvage their claims, petitioners posit that the continued presence of the mortgage on the public records somehow

has saved it from the ravages of § 363(f) of the Bankruptcy Code.²⁷

The argument completely misconstrues Louisiana's public records doctrine. Recordation creates no rights or obligations, but simply notifies third parties of the rights and obligations that the contracting parties have created by their contract. *Phillips v. Parker*, 483 So.2d 972, 975 (La. 1986); *Coldwell Banker J. Wesley Dowling & Associates, Inc. v. City Bank & Trust of Shreveport*, 602 So.2d 1051, 1053 (La. App. 2d Cir. 1992).

[R]ecordation does not purport to be and is not itself the source of rights. A recorded purchase from the legal owner transfers ownership to the purchaser, not because of the recordation, but because of the purchase. While the unrecorded purchase from the owner does not transfer ownership as far as third parties are concerned, a recorded purchase from one not the owner does not transfer ownership at all.

William V. Redmann, *The Louisiana Law of Recordation: Some Principles and Some Problems*, 39 Tul. L. Rev. 491, 495 (1965).

In particular, recordation "is neither proof nor promise of the validity of the recorded or written instrument, which alone can be the source of the rights asserted." *Gulf South Bank & Trust Co. v. Demarest*, 354 So.2d 695, 697 (La. App. 4th Cir. 1978). Thus, the recordation of a forged document does not make the document valid. *Id.*, 354 So.2d at 697-98. Similarly, the continued presence of the

²⁷ This argument, like several others raised in petitioners' brief, was not raised in either the district court or the court of appeals and therefore ought not be considered by this Court either. *Taylor v. Freeland & Kronz*, 503 U.S. at 645-46, 112 S. Ct. at 1649.

Second Mortgage on the public records cannot undo the effect of the bankruptcy court's sale orders. See *First Guaranty Bank v. Alford*, 366 So.2d 1299, 1302-03 (La. 1978) (recorded mortgage does not create right to foreclose absent existence of an underlying obligation). Those orders authorized and confirmed a sale of the mortgaged property free and clear of the Second Mortgage, rendering the Second Mortgage ineffective as an encumbrance against the property from the sale date forward.

Petitioners' argument stands this structure on its head. According to them, the failure to cancel an ineffective encumbrance from the public records somehow brings it back to life. See Pet. Brief 43-49. That argument finds no support anywhere in Louisiana law and is refuted not only by the cases cited above, but by numerous others. See, e.g., *Matter of Zedda*, 103 F.3d 1195, 1206 (5th Cir. 1997); *Gibraltar Sav., F.A. v. First Mortg. Corp.*, 825 F. Supp. 746, 749 (M.D. La. 1993); *Camel v. Waller*, 526 So. 2d 1086, 1089-90 (La. 1988); *First Nat. Bank of Ruston v. Mercer*, 448 So. 2d 1369, 1376 (La. App. 2d Cir. 1984); *Lacour v. Ford Inv. Corp.*, 183 So.2d 463, 466 (La. App. 4th Cir. 1966), *writ dismissed*, 250 La. 459, 196 So.2d 275 (1967).

By virtue of the bankruptcy court orders, the Second Mortgage ceased to affect the Leasehold Estate once the trustee sold it. Those orders preclude the petitioners' claim, which depends upon the current enforceability of the Second Mortgage. Nothing in Louisiana's law of recordation can revive it.

CONCLUSION

For the foregoing reasons, the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, reported as *Rivet v. Regions Bank of Louisiana, F.S.B.*, 108 F.3d 576 (5th Cir. 1997), should be affirmed.

Respectfully submitted,

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(6) Supreme Court, U.S.

FILED

JAN 5 1998

NO. 96-1971

CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MARY ANNA RIVET, MINNA REE WINER,
EDMOND G. MIRANNE, and EDMOND G. MIRANNE, JR.,
Petitioners.

v.

REGIONS BANK OF LOUISIANA,
WALTER L. BROWN, JR., PERRY S. BROWN, and
FOUNTAINBLEAU STORAGE ASSOCIATES,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners' opening brief demonstrated that the decision below runs counter to long-standing principles of federal jurisdiction, under which a lawsuit arises under federal law, and thus is removable to federal court from state court, only if a well-pleaded complaint shows that the plaintiffs' claims are based on rights that are granted by federal law. Under these principles, affirmative defenses are not considered in determining the contents of the well-pleaded complaint, so that the presence of a federal law defense is not sufficient to support federal jurisdiction. The decision below, we suggested, was really based on an outmoded distrust of the competence and the willingness of state courts to conscientiously apply federal law in determining whether otherwise valid state law claims are somehow precluded. And, as we showed, if the federal defense of res judicata is now held to be a proper basis for removal, there is no sound reason why other federal defenses should not also be a basis for removal. Thus, the decision below ventures out onto a slippery slope, with no real stopping places, that will entail a vast expansion of federal jurisdiction.

In the final analysis, respondents' argument to the contrary hangs by a single thread -- a tortured reading of a single footnote in one of this Court's cases. In our opening brief, we showed that this footnote, if it did rest on the notion that a federal defense can confer jurisdiction, would represent an aberration that has not been followed in more recent cases. In this reply brief, we first show how respondents' analysis is completely dependent on their construction of the footnote, and just how bare that thread is. We then respond to respondents' remaining attempts to answer our basic claims in this Court.

Respondents' Analysis

Respondents begin by recognizing the firmly established principle that a defendant's ability to advance a federal defense

to a state law claim is not a proper basis for federal jurisdiction. They further acknowledge that federal jurisdiction remains lacking if the plaintiff acknowledges the possible federal defense in his complaint but pleads the insufficiency of the defense. Respondents' Brief ("R. Br.") at 14. But respondents invoke the well-pleaded complaint rule and its "independent corollary," complete preemption. R. Br. 17. According to respondents, this doctrine was developed by four cases -- *Avco Corp. v. Machinists Lodge* 735, 390 U.S. 557 (1968); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987); and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). R. Br. 18-21.

Respondents then develop five propositions which, they say, support the assertion of federal jurisdiction in this case. First, according to respondents, if a state court complaint is brought under state law that the federal court determines to have been non-existent, the artful pleading doctrine permits the recharacterization of the complaint into one that is based on federal law, on the assumption that the necessary federal elements that would have supported federal jurisdiction were deliberately omitted to defeat removal. R. Br. 21-22. Respondents acknowledge, as they must, that the complete preemption cases are not controlling because there is no complete preemption here, *id.* 22. Instead, they say, the jurisdictional rule is the one created by the Court in *Federated Dep't Stores v. Moitie*, 452 U.S. 394 (1981) ("Moitie"). R. Br. 22-23.

Second, respondents argue that, properly understood, *Moitie* is really the analytic precursor of the complete preemption doctrine. After all, they point out, three of the four cases they identify as creating the complete preemption doctrine were actually decided after, and in light of, *Moitie*. R. Br. 26.

Third, they contend, *Moitie* stands for the proposition

that, when a state law claim is barred by a federal court judgment pursuant to the doctrine of res judicata, the claim is properly recharacterized as a complaint arising under federal law. R. Br. 27. Indeed, throughout their brief respondents repeatedly characterize *Moitie* as establishing a legal rule that may always be invoked to remove federally barred state court claims. E.g., R. Br. 9 (summary of argument, second paragraph, stating absolute rule); 10 ("the 'artful pleading' rule established by *Moitie*"); *id.* ("the jurisdiction rule of *Moitie*"), accord 36, top line; 30 (caption invokes "The Jurisdictional Rule of *Moitie*"); *id.* ("[c]ases falling within the scope of *Moitie's* jurisdictional rule").

Fourth, they argue that the holding establishing this bright line rule makes a great deal of sense because it advances two very important goals. R. Br. 32-36. Specifically, it ensures that the federal law of res judicata will be uniformly applied, and it enhances the significant federal interest in ensuring the full effectuation of the policies underlying res judicata.

Fifth, they argue that there is nothing wrong with deciding the merits of the preclusion defense as part of the determination of whether there is federal jurisdiction, because precisely the same sort of consideration is commonplace in the context of other jurisdictional determinations. R. Br. 36-38.

As we demonstrate in this reply brief, however, each and every one of these propositions is wrong.

1. **Moitie's Jurisdictional Holding Did Not and Could Not Have Established Any Rule Allowing Removal Based on the Res Judicata Effect of Federal Judgments on State Law Claims.**

In the first place, respondents err in arguing that this Court's decision in *Moitie* established any kind of rule allowing

removal based on the proposition that a federal judgment bars litigation of a state law claim. This fundamental error in interpretation of *Moitie* becomes apparent on a careful study of the celebrated footnote on which the court below rested its decision; the procedural context in which *Moitie* arose; and the ultimate disposition of the res judicata questions in *Moitie*.

Moitie arose in the aftermath of a federal antitrust action brought by the United States, and several "me-too" civil actions brought on behalf of private plaintiffs whose complaints tracked the allegations in the government's complaint. After the civil actions were dismissed for lack of standing, plaintiffs in most of the actions appealed. Counsel for the plaintiffs in two of the actions chose not to appeal, but rather refiled the cases in state court, purporting to raise only state law claims, but still tracking the allegations in the government's complaint. The defendants removed the state suit to federal court, and the district court analyzed the new state complaint and the dismissed federal court complaint and determined that plaintiffs had alleged "essentially federal claims." It therefore upheld the removal of the case and dismissed it as barred by the previous federal judgment. The plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit, and while this appeal was pending this Court held that private plaintiffs comparable to the *Moitie* plaintiffs did in fact have standing to sue for antitrust violations.

The court of appeals then reversed the dismissal of most of the private antitrust suits, on the ground that standing was in fact present. In *Moitie v. Federated Dep't Stores*, 611 F.2d 1267 (1980), it reached the same result with respect to the two plaintiffs who had refiled instead of appealing. It accepted the proposition that the district court had properly asserted jurisdiction, which was, according to the Ninth Circuit's opinion, the only issue that was briefed in that court; the parties apparently declined a pointed invitation from the court to address the issue of res judicata. 611 F.2d at 1268 n.2.

Proceeding to consider the unbriefed question, the court of appeals agreed that res judicata would ordinarily bar the suits. However, the court decided that it would be contrary to public policy and simple justice to apply the doctrine of res judicata to these plaintiffs in light of the fact that other plaintiffs (who had appealed) were being permitted to proceed and the dismissal of the non-appealing parties had been based on a case that had later been overruled.

This Court granted certiorari to decide whether this exception to res judicata was sound, but the individual plaintiffs, who were respondents in *Moitie*, apparently sought to avoid review on the theory that the case should not have been removed in the first place. This Court rejected that proposition in a one-paragraph footnote which is quoted in the respondent's brief at pages 24-25. The footnote first noted that the court of appeals in that case had affirmed the propriety of removal on the theory that the claims were federal in nature. The Court then stated, "We agree that at least some of the claims had a sufficient federal character to support removal." (emphasis added). Next the Court quoted a treatise to the effect that artful pleading may not be used to cut off a defendant's right to a federal forum, and that sometimes it is necessary to determine whether the real nature of the action is federal. The next three sentences, in our view, are the key to understanding the footnote and, along with the language emphasized above, contain the only jurisdictional holding that could be attributed to the footnote:

The District Court applied that settled principle to the facts of this case. After "an extensive review and analysis of the origins and substance of" the two *Brown* complaints, it found, and the Court of Appeals expressly agreed, that respondents had attempted to avoid removal jurisdiction by "artful[ly]" casting their

"essentially federal law claims" as state law claims. **We will not question here that factual finding.** [citations omitted].

452 U.S. at 398 n.2 (emphasis added).

From a review of the footnote, it quickly becomes apparent that the Court did not specify the claims that it had determined were federal, and thus removable; nor did it explain what made those claims federal despite the fact that the respondents had apparently been at pains to plead them all as state claims. Rather, the Court concluded at "at least some" of the claims in the case were federal, and that rather than reaching its own independent conclusion in that regard, it was resting its acceptance of federal jurisdiction on the district court's determination of artful pleading. The effect of this observation thus seems to be two-fold -- first, that it is the district court's decision about the jurisdictional basis that the Court was following, and, in that regard, that the district court's careful analysis of the nature of the removed complaint should not be disturbed at the second level of appellate review.

What makes ascertainment of the precedential impact of the Court's footnote particularly difficult is that the *Moitie* court of appeals, like this Court, did not describe the district court's analysis or the basis for its conclusion. Moreover, the district court's jurisdictional ruling was not officially reported. And because the Court was careful to note that it was not independently agreeing with each and every part of the district court's conclusions about jurisdiction, but only that, in light of the findings below, it was satisfied that "at least some" of the claims were sufficiently federal to support removal, the unreported district court opinion was not itself being elevated to the level of Supreme Court precedent.

There are, however, a number of clues in the opinion

clearly showing that *Moitie* does not stand for the proposition that respondents here and the panel majority below drew from it, namely that the res judicata effects of a federal judgment render any subsequent state court complaint that is barred by that judgment "exclusively federal" in character and hence removable.

The end of the opinion provides the most important evidence that the impact of res judicata on the state law claims in *Moitie* was not the basis for federal jurisdiction. After all, the Court did not decide that the state law claims were defeated by res judicata. That question was remanded for disposition in the court of appeals, on the ground that it was "unnecessary for the Court to reach that issue." 452 U.S. at 402. The only claims that the Court held had been extinguished were the federal antitrust claims that the Court concluded were also in the case. But if, in fact, the basis for jurisdiction were that res judicata principles barred prosecution of the state law claims, and thus they must be recharacterized as federal claims, then the decision of that res judicata impact would scarcely be unnecessary; it would have been necessary to the jurisdictional holding. It follows that, whatever claims the Court felt were sufficiently federal to warrant removal, it was **not** the state law claims that were allegedly barred by res judicata.¹

¹ This logical conclusion could be avoided if actual bar by res judicata were not required to warrant removal, but only the mere advancement of a res judicata defense. But even respondents do not contend that a defendant can remove an otherwise wholly state law case to federal court merely by pleading a res judicata defense. The wholesale increase in the federal docket and consequent invasion of the states' sovereign rights to adjudicate cases in their own courts that such a doctrine would foster is sufficient reason not to adopt it.

Moreover, although this Court did not explicate the district court's jurisdictional decision, or distinguish between removal based on res judicata or removal based on the belief that the plaintiffs there were relying on essentially federal law, there are fleeting references in the decision of the court of appeals that strongly imply that res judicata effects were not the basis for removal. According to the court of appeals, in removing the case, defendants "assert[ed] that the state law claims were really disguised federal antitrust claims. The district court agreed with defendants." 611 F.2d at 1268. And in affirming the removal decision, the court said, "The court below correctly held that the claims presented were federal in nature, arising solely from price fixing on defendants' part." No reference was made to artful pleading, and certainly not to res judicata. Absent some other explanation from this Court, it is fair to assume that its basis for accepting the propriety of federal jurisdiction was also not res judicata.

That this construction of the footnote is the most sensible one is also apparent in light of the fact that, even under respondents' analysis, what the district court below did to petitioners' complaint in this case was not really a recharacterization of the state law claims that rendered them federal. After all, what has allegedly been artfully pleaded is not an essential element of the state law claim, but an allegedly missing federal defense. See Rule 8(c), Federal Rules of Civil Procedure ("In pleading to a preceding pleading a party shall set forth affirmatively . . . res judicata . . . , and any other matter constituting an avoidance or affirmative defense.") Respondents contend that what petitioners did that constituted "artful pleading" was to fail to make explicit reference to the judgment of the bankruptcy court. But inclusion of such a reference would not have been sufficient to render the complaint one that arises under federal law. After all, under respondents' theory, the petitioners would still have had to allege their state law

claim, as well as setting forth the reasons why the bankruptcy judgment did not bar their claim. Thus, respondents' version of the artful pleading doctrine does not involve recharacterizing the state law claim at all -- it only requires state court plaintiffs overtly to allege the inapplicability of a federal law defense. And as respondents themselves concede at the outset of their analysis, it is not enough to create federal jurisdiction that the plaintiffs plead facts that would create a federal defense, and then allege facts (or legal considerations) which defeat that federal defense. This is true even if the validity of the federal defense were the only substantial or disputed question in the case. *Caterpillar*, 482 U.S. at 393.

Still another clue that *Moitie* does not establish a rule that the mere pleading of a federally barred state law claim is sufficient to support removal is this Court's repeated reference to the district court's determination in that case as a "factual finding" -- something that it "found" by the application of settled principles "to the facts of this case" -- and indeed based on an "extensive" review and analysis comparing the two complaints. But it surely does not take any such "findings" to base jurisdiction on the principles of res judicata. Presumably the "findings" in the district court were those determining that the federal claims previously dismissed in the initial case had been mischaracterized in the second case as state ones, as evidenced by the strong similarity between the factual allegations in the two complaints. This appears to be the most natural reading of the footnote.

By contrast, in the case now before the Court, the district court did not make an extensive analysis of the complaint, or compare it to claims made in the bankruptcy proceeding, before it determined that the case was federal in nature and therefore removable. It simply concluded that the claims were barred by res judicata and then stated that, under governing Fifth Circuit precedent, the res judicata effects of a

federal judgment are sufficient to render a state law claim removable as a matter of law. Unlike *Moitie*, therefore, there is no extensive review and no factual findings to which this Court can defer, and insofar as *Moitie's* holding is actually that the Court should defer to such factual findings, that fact alone is sufficient to warrant the conclusion that *Moitie* does not apply here.

Respondents attempt to derive some support for their construction of the *Moitie* footnote by discussing the three cases cited at the end of the footnote; if anything, however, the Court's citation of these cases supports petitioners' understanding of the footnote. In each of the three cases, claims had been filed in state court involving alleged anti-competitive conduct, one of them in the labor context; the district courts stated that the complaints, although purporting to rely on state law, read like federal antitrust claims (and, in one case, a secondary boycott claim that would be actionable under section 303 of the LMRA). These courts concluded that the plaintiffs there were really invoking these federal rights, and upheld removal solely on this basis. Not a single one of these cases involved removal based on an affirmative defense; none involved removal based on the preclusion of the state law claim by res judicata.

And yet respondents here contend that, in a cryptic footnote that does not address the basis for removal, this Court intended to invent *sub silentio* a novel ground for removal, that not a single reported opinion had ever previously accepted, and that runs directly contrary to a hundred years of precedent barring removal based on the presence of a federal question in a defense. And respondents urge the Court to announce now that this construction was really what was intended, even though, as discussed in our opening brief, at 19-25, the Court has repeatedly disavowed any suggestion that a federal defense may support removal in its post-*Moitie* decisions. Respondents

cite some decisions from the lower federal courts which, struggling with the *Moitie* footnote, have opined that it was based on res judicata effect; but they never come to grips with this Court's post-*Moitie* decisions and they never offer any basis in *Moitie* itself for construing the footnote in this way.

In sum, the most basic of respondents' five key propositions -- that *Moitie* creates a rule allowing removal whenever a state law claim is barred by a federal judgment, so that a federal court may apply the doctrine of res judicata -- is utterly without foundation.

2. The Novel Jurisdictional Doctrine That the Defense of Federal Res Judicata Is Sufficient to Create Removal Jurisdiction Need Not Be Created in Order to Ensure the Uniform Interpretation of Federal Res Judicata Law or the Advancement of the Underlying Federal Interests.

Respondents also argue that their construction of the *Moitie* footnote should be adopted to ensure that the federal law of res judicata will receive uniform interpretation in all lower courts, and that the integrity of federal judgments is fully respected. These are both worthy objectives, but the fact is that the very same objectives could be said to support the extension of federal jurisdiction into other areas where federal defenses are asserted. Thus, if this is a good enough reason to read the *Moitie* footnote to create a rule of federal jurisdiction for this federal defense, it is hard to see why other federal defenses should be deemed less worthy.

In effect, on respondents' theory there would now be two "independent corollaries" to the well-pleaded complaint rule -- corollary (a) being complete preemption, and corollary (b) being complete preclusion. They say that the reason for

elevating preclusion to the level of complete preemption is that it is "equally powerful," R. Br. 27, but they never say just why that is so. They never explain why other defenses based on federal law are not just as powerful and important as preclusion. The danger here is that corollary (b) will necessarily expand so that the "preclusion" will not simply be preclusion under theories of res judicata but also preclusion because of other federal bars to pursuit of a state law claim.

For example, the First Amendment surely rivals in importance the doctrine of res judicata, and the interpretation of this Court's decisions about the public figure doctrine, the law of malice, and similar libel issues, would surely gain greater cohesiveness if there were only twelve circuits, instead of twelve circuits plus fifty-one local jurisdictions developing the First Amendment law of libel. On that theory, respondents' argument would justify the removal of all libel cases to the federal courts. And what of pre-emption of state cases in the labor area, under the NLRA, for example, *see Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132 (1976); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); or ERISA as well? Surely the administration of the law in those areas would be smoother if defendants could remove cases in which they raise such preemption defenses and have them litigated in the federal courts, which customarily review NLRB decisions and thus are far more familiar with federal labor law principles than are the state courts. On that theory, both *Franchise Tax Board* and *Caterpillar*, which held that ERISA and NLRA preemption defenses are not grounds for removal, ought to be overruled. And tribal sovereign immunity -- surely that too is an important federal doctrine, and many tribes believe that they cannot get a fair hearing at the hands of state judges who are responsive to local politics. Thus, *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838 (1989) should also be overruled so that this defense is also a sufficient basis to enable a defendant to secure the

protection of the federal courts.

The fact is, of course, that as this Court has repeatedly stated, cases are not to be removed from state courts on the ground that state courts cannot be trusted to apply federal law in the proper manner. The ultimate guarantee that federal law will receive a uniform interpretation by all courts empowered to consider federal issues is that cases raising such questions are subject to review by this Court. To be sure, different federal circuits or district courts sometimes arrive at different interpretations of federal law, just as there are differences among the state courts and between state and federal courts. But this Court's jurisdiction extends to both sets of lower federal courts, and the Court is vigilant to ensure proper application of federal law in all lower courts.²

3. *Moitie* Is Not the "Precursor" of the Doctrine of Complete Preemption.

In an apparent effort to provide their construction of the

² Respondents suggest that removal is a better way to deal with a state suit that is barred by a federal judgment because it avoids the offense to state sovereignty that is entailed by issuance of an injunction against relitigation, because removal "works automatically." R. Br. 34-35. In fact, part of the removal process is the issuance of a notice to the state court that, in a manner comparable to an injunction, bars further proceedings unless the case is remanded. 28 U.S.C. § 1446(d). But removal is a far more serious invasion of state sovereignty than a mere injunction, because it deprives that state of its sovereign authority to provide a tribunal for the disposition of its citizens' claims. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941).

Moitie footnote with a patina of intellectual respectability, respondents argue that, even though the doctrine of complete preemption and the ensuing "recharacterization" of otherwise state law complaints do not apply here, *Moitie* should be deemed the analytic precursor of the doctrine of complete preemption. After all, respondents urge, three of the four key cases in this Court on the issue of complete preemption -- *Franchise Tax Board*, *Caterpillar*, and *Metropolitan Life* -- were all decided after and in light of *Moitie*. Not only is this argument historically incorrect, but review of those cases shows that they undercut respondents' argument.

None of these three post-*Moitie* cases established the rule that state law claims could be removed based on their recharacterization under the doctrine of complete preemption. To the contrary, that rule was firmly established in 1968 by *Avco Corp. v. Machinists Lodge* 735, 390 U.S. 557 (1968), and was applied or invoked several times after *Avco* and before *Moitie*. E.g., *Boys Markets v. Retail Clerks Local* 770, 398 U.S. 235, 244 *et seq.* (1970); see also *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666, 675 (1974). It could hardly be said that, in *Franchise Tax Board* and *Caterpillar*, the Court was developing the doctrine of removal pursuant to complete preemption -- if anything it was imposing firm limits on the reach of that doctrine, holding that it would not apply just because a case might be barred by some other federal preemption doctrine (*Franchise Tax Board*) and that it would not apply even if a federal question under section 301 had to be decided in order to resolve a defense to a state law claim (*Caterpillar*). Nor did any of these three cases even cite, much less acknowledge any debt to, the majority opinion in *Moitie*. The notion that *Moitie* is their analytic precursor, or the precursor of recharacterization through the doctrine of complete

preemption, is imaginative indeed.³

Moreover, in *Metropolitan Life* the Court strongly implied that common law adjudication was not an appropriate means for the development of additional exceptions to the rule against removal based on the presence of a federal bar to the prosecution of a state law claim. In *Metropolitan Life*, the question was whether a state law claim that depended on the determination of the meaning of an ERISA plan arose under federal law and hence was removable to federal court. The Court discussed the general rule that preemption of a state law claim, even ERISA preemption of such a claim, does not convert the state claim into one arising under federal law. "In the absence of explicit direction from Congress, this question would be a close one," 481 U.S. at 64, and "we would be reluctant to find that extraordinary pre-emptive power [comparable to LMRA section 301] that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Accord, Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841-842 (1989) (declining to craft exception to permit removal based on tribal immunity defense, because Congress has provided by statute for removal based on some immunities)

However, ERISA's jurisdictional provision "closely parallels that of § 301," *id.*, and the Conference Report on ERISA explicitly stated that suits to enforce benefit rights or to recover benefits under the plan "are to be regarded as arising

³ *Moitie* is not cited at all in *Franchise Tax Board* or *Metropolitan Life*. Only Justice Brennan's dissenting opinion is cited in *Caterpillar*, and then as indirect support for the proposition that the artful pleading doctrine cannot be invoked to support removal on the basis of facts not alleged in the complaint. 486 U.S. at 397 and n.11.

under the laws of the United States in similar fashion to those brought under section 301 . . ." *Id.* 65-66. The Court concluded that "[n]o more specific reference to the Avco rule can be expected . . ." and "Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court." *Id.* 66. "Accordingly, this suit . . . is necessarily federal in character by virtue of the clearly manifested intent of Congress." *Id.* 67.

Here, by contrast, Congress has not manifested any desire that the federal defense of res judicata support federal jurisdiction or removal to federal court, and the Fifth Circuit's decision allowing such removal should be reversed.

4. Recharacterization Cannot Be Justified on the Mere Nonexistence of State Law Supporting the Complaint.

Respondents contend that, under the doctrine of complete preemption, a federal court may decide that a state law claim should be recharacterized based upon its investigation of the state law on which the complaint purports to rely, if it concludes that state law would not, in fact, provide a basis for relief for the claims in the complaint. Thus, according to respondents' argument, it is but a short step to deciding that, if a state law claim can be found to be barred by an existing state law judgment, that too is a basis for deciding that the state law claim is "nonexistent" and that therefore the complaint must be federal in nature rather than state in nature.

However, complete preemption is not based on the "nonexistence" of relevant state law. Complete preemption removal is proper only if court a concludes that the claims rely on a collective bargaining agreement (or on an ERISA plan, after *Metropolitan Life*). And the case is removable because

federal law has so thoroughly regulated the field that the claim is not "extinguished" -- it is transformed into one that arises under federal law. The mere fact that there is no state law supporting the claim does not support removal.

Thus, complete preemption and complete preclusion are not two different ways of rendering a state law claim nonexistent. Under complete preemption, the federal claim supplants the state claim. Under claim preclusion, by contrast, the state law claim remains a state law claim, it is just subject to a federal affirmative defense. Otherwise, as argued above in point 2, there is no principled way to distinguish between preclusion and any other federal defense in this context, and respondents' theory will entail a vast expansion of federal removal jurisdiction.

5. In No Other Context Does Jurisdiction Depend on a Determination That the Case Is Lacking in Merit.

Finally, respondents try to excuse the district court's having decided the merits before ascertaining whether it had jurisdiction of the case by arguing that this is frequently done in other contexts. R. Br. 36-38. Respondent cites the complete preemption doctrine as its first and best example, stating that "the court must decide a merits issue, federal preemption of plaintiff's state law claims, to determine its jurisdiction." *Id.* 36.

But there is a very important difference between this and every other context. The mere fact that a claim is completely preempted does not mean that it must be dismissed. Once a court decides that a state law claim depends on a collective bargaining agreement and so complete preemption applies, it proceeds to consider the case under the precedents decided under LMRA section 301. Those precedents may well require dismissal of the claim (typically, dismissal without prejudice for failure to exhaust, or dismissal with prejudice on grounds of

timeliness or failure to show a breach of the duty of fair representation), and knowledge of these precedents often provides a powerful incentive for assertion of complete preemption. But the mere adoption of jurisdiction is not legally equivalent to dismissal of the claim.

Respondents' theory is very different. If the court concludes that the case is barred by res judicata, that is simultaneously sufficient to effect removal of the case and dismissal of the claim on the merits. Thus under respondents' rule, a judge faced with a removal petition must apply the following formulation -- if a plaintiff is dead on the merits, then I have jurisdiction; but if the plaintiff is not dead on the merits, then I lack jurisdiction. Try as they may to show that this circular reasoning has been applied in other contexts, there is not a single other example in the law of federal jurisdiction.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded with instructions to remand to state court.

Respectfully submitted,

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January 5, 1998

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